No. 272

IN THE

SUPREME COURT OF THE UNITED STATES

RESERVE LIFE INSURANCE COMPANY,
GEORGE WASHINGTON LIFE INSURANCE COMPANY, and
PROFESSIONAL INSURANCE CORPORATION,

Petitioners,

vs.

BANKERS LIFE AND CASUALTY COMPANY,
J. EDWIN LARSON and HARTFORD ACCIDENT and INDEMNITY COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI
to
THE UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

JAMES A. DIXON
908 Ainsley Building,
Miami 32, Florida,
Attorney for Petitioners.

INDEX OF CONTENTS

	Page
INTRODUCTION	
(a) The Opinion	2
(b) Grounds on which the Jurisdiction of the Court is invoked.	2
(c) The Questions Presented for Review	2
(d) The Statutes which the Case Involves	4
(e) Statement of the Case	4
(f) Reasons for Granting the Writ	9
ARGUMENT	12
The Conflict with Other Circuits	13
The Conflict with Prior Fifth Circuit Cases	19
The Conflict with Prior Supreme Court Cases	21
The Necessity of Injury to the Public Interest. Injury to a Single Competitor Among Many Not Enough	22
The Propriety of Summary Judgment	34
PRAYER	36
CERTIFICATE OF SERVICE	36
APPENDIX A The Opinion of The Fifth Circuit	App. 1
APPENDIX B The Order of the Fifth Circuit	App. 11
APPENDIX C The Text of The Statutes Involved	App. 12

AUTHORITIES

Page

Apex Hosiery Co. v. Leader
210 U. S. 469 ..... 11, 21, 22

Bankers Life & Casualty Co. v. Holland, Judge
199 F. (2d) 593, 346 U. S. 379 5

Bruce Construction Co. v. U. S.
242 F. (2d) 873 13

Feddersen Motors, Inc. v. Ward
180 F. (2nd) 519 ..... 10, 19

Hudson Sales Corp. v. Waldrip
211 F. (2d) 268 ..... 11, 19

Hunt v. Crumboch
143 F. (2d) 902, affirmed 325 U. S. 821 ..... 10, 15, 22

Interborough News Co. v. Curtis Publishing Co.
225 F. (2d) 289 ..... 9, 14

Kinnear-Weed Corp. v. Humble Oil Co.
214 F. (2d) 891 ..... 11, 20

Klor's, Inc. v. Broadway-Hale Stores, Inc.
255 F. (2d) 214 — C. C. A. 9 ..... 9, 10, 17, 32, 33

Leader v. Apex Hosiery Co.
108 F. (2d) 71, affirmed 310 U. S. 469 ..... 10, 16

Miller Motors, Inc. v. Ford Motor Co.
252 F. (2d) 441 — C. C. A. 4 ..... 8, 10, 17, 32

AUTHORITIES (cont.)

	Page
Northern Pacific Railway Co. v. U. S. 355 U. S. 653	32
Packard Motor Co. v. Webster 243 F. (2d) 418	10
Radovich v. National Football League 352 U. S. 445	11
Riggall v. Washington County Medical Society 249 F. (2d) 266 — C. C. A. 8	9, 10, 17
Schwing Motor Co. v. Hudson Sales Corp 239 F. (2d) 176	10, 16, 24
Shotkin v. General Electric Co. 171 F. (2d) 236	10, 18
Standard Oil Co. U. S. 221 U. S. 1	30
Surkin v. Charteris 197 F. (2d) 77	35
U. S. v. DuPont 351 U. S. 377	31
U. S. v. Employing Plasterers Assn. 347 U. S. 186, at 189	13
U. S. v. Socony-Vacuum Oil Co. 310 U. S. 150	30, 31

AUTHORITIES (cont.)

Page

Wilder Mfg. Co. v. Corn Products Co
236 U. S. 165 ..... 11, 21

Wm. Filene's Sons Co. v. Fashion Originators' Guild
90 F. (2d) 556 9

STATUTES CITED

Rules of Civil Procedure, 56 (f) 34

28 U. S. C., Sec. 1254 (1) 2

Section 1 of Sherman Act, 15 U. S. C., Sec. 1 ..... 4, App. 12

Section 4 of the Clayton Act, 15 U. S. C., Sec. 15 ..... 4, App. 13

Section 16 of 15 U. S. C. 4

TEXTS

6 Moore's Federal Practice, p. 2129 35

IN THE

SUPREME COURT OF THE UNITED STATES

RESERVE LIFE INSURANCE COMPANY,
GEORGE WASHINGTON LIFE INSURANCE COMPANY, and
PROFESSIONAL INSURANCE CORPORATION,

Petitioners,

vs.

BANKERS LIFE AND CASUALTY COMPANY,
J. EDWIN LARSON and HARTFORD ACCIDENT and INDEMNITY COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI to THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

Your petitioners, RESERVE LIFE INSURANCE COMPANY, GEORGE WASHINGTON LIFE INSURANCE COMPANY and PROFESSIONAL INSURANCE CORPORATION, hereby petition this Court for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, and make respondents thereto BANKERS LIFE AND CASUALTY COMPANY, J. EDWIN LARSON and HARTFORD ACCIDENT AND INDEMNITY COMPANY.

Your petitioners show:

(a) **The Opinion Below**

The opinion of the District Court has not been reported, but it appears in the printed record filed herewith at Vol. V, page 2777. The opinion of the Court of Appeals has not yet been reported, but its opinion and judgment appear in appendices hereto.

(b) **Grounds on which the jurisdiction of the Court is invoked.**

(i) The final judgment in the District Court is dated October 18, 1956, and was entered October 19, 1956. The opinion of the United States Circuit Court of Appeals is dated June 30, 1958. The mandate thereon has not been issued, issuance having been stayed, pending this application for certiorari, pursuant to motion of the petitioners herein.

(ii) No order has been made respecting a rehearing, as no rehearing has been applied for. No extension of time to petition for certiorari has been applied for or granted.

(iii) The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by certiorari is 28 U. S. C., sec. 1254 (1).

(c) **The Questions Presented for Review.**

(i) May an action for treble damages be maintained for a supposed conspiracy in restrain of trade in the market for life, accident and health and hospitalization insurance, where the record shows without controversy that:

(a) only a single competitor in a highly competitive market is alleged or proved to have suffered injury, and

(b) where, during the pendency of the supposed conspiracy, the number of suppliers of the commodity was constantly increasing, and

(c) the price of the commodity continued freely competitive at all times, and

(d) the supply of the commodity was unlimited at all times, and

(e) no member of the public was at any time at loss to obtain the commodity at fully competitive prices, and

(f) there was no diminution of the quality of the commodity in question or any other adverse effect upon competition in the relevant market.

(ii) Under the circumstances mentioned in the preceding question, is the granting of a summary judgment in favor of the defendants reversible error?

Other questions were presented to the Court of Appeals, but it is believed that these are the basic and controlling questions in this case. Such other questions are reserved for determination in other appropriate proceedings.

(d) The statutes which the case involves are:

(i) Section 1 of the Sherman Act, 15 U. S. C., Sec. 1, and

(ii) Section 4 of the Clayton Act, 15 U. S. C., Sec. 15.

The text of these sections appears in an appendix hereto. Section 16 of 15 U. S. C. is not involved herein because no criminal prosecutions or equity proceedings have been instituted by the Government in connection with the subject matter of this suit.

(e) **Statement of The Case.**

The plaintiff, BANKERS LIFE AND CASUALTY COMPANY, hereafter referred to as BANKERS, is a corporation engaged in writing life, accident and health and hospitalization insurance in practically every State in the Union. The defendants were originally ZACK D. CRAVEY, Insurance Commissioner of Georgia, J. EDWIN LARSON, Insurance Commissioner of Florida, HARTFORD ACCIDENT AND INDEMNITY COMPANY, the surety upon MR. CRAVEY'S official bond, three insurance companies competitive with the plaintiff BANKERS, RESERVE LIFE INSURANCE COMPANY, GEORGE WASHINGTON LIFE INSURANCE COMPANY and PROFESSIONAL INSURANCE CORPORATION, hereafter collectively referred to as RESERVE, and MR. C. C. BRADLEY, who was never served with process and who was subsequently dismissed as a party.

Shortly after this suit was filed in 1952, the case was

severed as to MR. CRAVEY and transferred to the Northern District of Georgia. This transfer was the subject of mandamus proceedings in the Fifth Circuit and in this Court.

Bankers Life & Casualty Co. v. Holland, Judge
199 F. (2nd) 593
346 U. S. 379.

The case against MR. CRAVEY was subsequently dismissed on motion of the plaintiff.

The jurisdiction of the Federal Court was invoked in the first instance by the plaintiff charging the defendants with a violation of the Sherman Act, Section 1.

The plaintiff's case was framed upon the theory that about 1949, the Insurance Commissioners of Georgia and Florida formed a conspiracy "to suppress, eliminate and destroy plaintiff's business in Florida, Georgia and elsewhere." (Record Vol. I, page 8.) RESERVE is supposed to have joined the conspiracy about 1951.

The plaintiff claims a private injury because MR. CRAVEY, in 1951, refused to renew its license to do business in Georgia, and some of its agency staff were employed by RESERVE. The plaintiff also claims a private injury because, at the supposed instigation of MR. CRAVEY and MR. LARSON, it was subjected to an examination by the National Association of Insurance Commissioners sooner than would normally have been the case. The plaintiff also claims a private injury by reason of certain acts of MR. LARSON, such as refusing to license its agents, disapproval of its policy forms, criticisms of its

advertising and handling of claims, etc. The plaintiff also claims that insurance commissioners of other states were influenced against it by MR. LARSON and MR. CRAVEY, although the extent or effect of this is left extremely vague.

Extensive use of pre-trial discovery was made by all parties. The printed record contains 67 depositions, and many others were taken which do not appear in the record. Both sides obtained production of documents, and answers to interrogatories, including the names of prospective witnesses. After four years of these proceedings, the District Judge set the case for pre-trial hearing. (Record, Vol. IV, page 2043).

All parties thereupon moved for summary judgment (Plaintiff's motion, Record, VOL. V, page 2705; LARSON'S motion, Record, Vol. IV, page 2088; RESERVE'S motion, Vol. IV, page 2044). The motions of LARSON and RESERVE were supported by additional evidence in the form of affidavits and exhibits. The plaintiff did not support its motion by affidavits or otherwise, and did not file affidavits in opposition to those attached to the motions of LARSON and RESERVE, nor did it request further time to do so or make any attempt to show that any additional evidence would be otherwise available to it upon a trial.

The evidence thus adduced before the Court failed to show that any person, firm or corporation other than the plaintiff, or any member or class of the public, had suffered any injury as a result of the supposed conspiracy. On the contrary, it showed affirmatively:

1. *That the number of suppliers of the commodity in question (life, accident and health and hospitalization insurance) in Georgia and Florida had risen steadily during the operation of the supposed conspiracy.* This appears from a tabulation prepared by the Insurance Commissioner of Florida, which is attached to his deposition and appears at Record, Vol. V, page 2655. This further appears from a tabulation of the suppliers of this commodity in Georgia, attached to an affidavit of Mr. CRAVEY filed in support of RESERVE'S motion for summary judgment (Record, Vol. IV, pages 2049 to 2077). Both of these tabulations are completely uncontradicted.

2. *Any member of the public who desired to buy life, accident and health and hospitalization insurance in either Georgia or Florida could do so without difficulty.* The plaintiff took a series of depositions at various places in Georgia from members of the public who had written to the plaintiff after MR. CRAVEY had refused to renew its license. Every one of these witnesses who was interrogated to this end had obtained other satisfactory insurance coverage without difficulty. These depositions begin at four places in the printed record (Record, Vol. III, page 1143, page 1277, page 1306, page 1405). There is no contrary evidence in the record.

3. *During the operation of the supposed conspiracy, the premiums collected by the plaintiff in Florida rose at a steady, indeed a spectacular rate.* This appears from a tabulation attached to MR. LARSON'S deposition (Record, Vol. V, page 2547).

There is no contrary evidence in the record.

4. *The statutes of both Florida and Georgia place no limit upon the amount of insurance which any company may write, subject only to the reserves required to keep it solvent.* Judicial notice of this fact is invited.

5. *The statutes of neither Georgia nor Florida regulate the rates charged by insurance companies for these types of coverage.* Judicial notice of this fact is invited.

6. *At all times during the operation of the supposed conspiracy, the rate situation was completely competitive.* This appears in Mr. LARSON'S deposition (Record, Vol. V, page 2428). It is uncontradicted in the record.

After hearing two days of oral argument and with the assistance of briefs from all counsel, the District Court denied the plaintiff's motion for summary judgment, and granted the motions of the defendants.

The plaintiff thereupon took an appeal to the Court of Appeals. Extensive briefs were filed by all parties. The case was argued orally on April 8, 1958. After the oral argument, there came to the attention of counsel for RESERVE three additional cases bearing upon the questions proposed by this petition for certiorari, which were called to the attention of the sitting judges of the Court of Appeals before the rendition of its opinion. These cases are:

Miller Motors, Inc. v. Ford Motor Co.
252 F. (2nd) 551 - C. C. A. 4

Riggall v. Washington County Medical Society
249 F. (2nd) 266 - C. C. A. 8

Klor's, Inc. v. Broadway-Hale Stores, Inc.
255 F. (2nd) 214 - C. C. A. 9.

The special significance of two of these cases will be pointed out hereafter. The last mentioned is now pending before this Court on petition for certiorari and is No. 76 on its docket for the October, 1958 Term.

Reasons For Granting The Writ

It is believed that certiorari should be granted in this case because:

1. The opinion of the Fifth Circuit herein is contrary to the following cases from other circuits, which hold that something more than private injury to one of many competitors must be shown to support a treble-damage action:

First Circuit:

Wm. Filene's Sons Co. v. Fashion Originators' Guild,
90 F. (2nd) 556.

Second Circuit:

Interborough News Co. v. Curtis Publishing Co.,
225 F. (2nd) 289.

Third Circuit:

Hunt v. Ciumbach,
143 F. (2nd) 902, affirmed 325 U. S. 821.

Leader v. Apex Hosiery Co.,
108 F. (2nd) 71, affirmed 310 U. S. 469.

D. C. Circuit:

Packard Motor Co. v. Webster,
243 F. (2nd) 418.

Fourth Circuit:

Schwing v. Hudson Sales Corp.,
239 F. (2nd) 176.

Miller Motors, Inc. v. Ford Motor Co.,
252 F. (2nd) 441.

Eighth Circuit:

Riggall v. Washington County Medical Society,
249 F. (2nd) 266.

Ninth Circuit:

Klor's, Inc. v. Broadway-Hale Stores, Inc.,
255 F. (2nd) 214.

Tenth Circuit:

Shotkin v. General Electric Co.,
171 F. (2nd) 236.

Fedderson Motors v. Ward,
180 F. (2nd) 519.

2. The opinion of the Fifth Circuit herein is contrary to at least two of its own previous decisions:

Hudson Sales Corp. v. Waldrip,
211 F. (2nd) 268.

Kinnear-Weed Corp. v. Humble Oil Co.,
214 F. (2nd) 891.

3. The opinion of the Fifth Circuit herein is contrary to previous decisions of this Court:

Wilder Mfg. Co. v. Corn Products Co.
236 U. S. 165.

Apex Hosiery Co. v. Leader,
210 U. S. 469.

4. The opinion of the Fifth Circuit herein misinterprets and misapplies the recent decision of this Court in

Radovich v. National Football League,
352 U. S. 445.

Although the opinion herein does not cite *Radovich*, that case was much argued on brief and orally before the Fifth Circuit, and in view of the Fifth Circuit's departure from its previous opinions, it is believed that its opinion in this case was influenced by the opinion in that case.

5. Where facts which show that plaintiff has no cause of action are undisputed in the record, after

the plaintiff has had four years of opportunity to disprove them, summary judgment is appropriate, and the possibility that the plaintiff may "better its case" before trial is not sufficient to reverse the summary judgment.

ARGUMENT

It is obvious that the panel of judges who heard this case in the Fifth Circuit were irritated by the size of the record, and we think it is fairly clear that they did not make a "line by line" examination of it. But to decide the question of the existence of an injury to the public, the Fifth Circuit did not need to make a "line by line" examination of the record, nor is it necessary for this Court to do so. We implore this Court, as we did the Fifth Circuit, not to be appalled by the size of the record and jump to the conclusion that in 3,000 pages there must be some disputed fact which would preclude summary judgment. Whatever may be true as to other issues in the case, it is not true of this issue of public injury. The facts, which, without dispute, show that there has been no public injury, are few in number and were clearly pointed out to the Fifth Circuit in RESERVE'S brief. The briefs of the plaintiff did not even suggest any dispute as to these facts.

The opinion of the Fifth Circuit refers to *allegations* in the complaint, which it regards as sufficient to charge public injury. However, allegations are not enough to prevent the entry of summary judgment when a *factual* showing to the contrary is made. The Fifth Circuit has so held in a strong opinion in which two of the Judges who sat in this case participated.

Bruce Construction Company vs. U. S.
242 F. 2d 873.

This Court itself has suggested the desirability of summary judgment procedure in complex but unfounded antitrust cases to avoid "an expensive, full-dress trial".

U. S. vs. Employing Plasterers Association
347 U.S. 186, at 189.

The facts which we have cited above in the Statement of the Case, paragraphs 1 through 6, (page 7), are clearly uncontradicted. It is also clear that these are *all* the facts in the record bearing on the question of the effect of the supposed conspiracy upon competition in interstate commerce. The only question is what inferences *as a matter of law* should, or can, be made from them, even taking these facts in the light most favorable to the plaintiff.

The Conflict with Other Circuits.

Under these circumstances, the opinion of the Fifth Circuit is contrary to that of the other circuits and of this Court mentioned above. We believe that the conflict will be made best to appear by a series of quotations from the cited cases, or lower court opinions approved therein.

First Circuit:

Wm. Filene's Sons Co. v. Fashion Originators' Guild,
90 F. (2nd) 556.

"The master's report does not disclose any of

the characteristics of an unreasonable restraint of trade or monopoly in violation of the Sherman Act . . . the essential elements of which are (1) price control, (2) production control, (3) deterioration in quality. The fundamental test, . . . is a detriment to the public."

(at page 559)

Second Circuit:

Interborough News Company v. The Curtis Publishing Co.,
225 F. (2nd) 289.

"The Sherman Act is designed to assure to the public at large the benefits which accrue from the flow of commerce and trade unrestricted by unreasonable restraints thereon. The public interest is sought to be protected; private interests are only incidentally within its protective force in that private rights encroached upon by violations of the Act may be vindicated through the processes of Sections 4 and 16 of the Clayton Act in order to protect the paramount public interest . . .

"The final test to be applied to plaintiff's First Separate Claim to determine whether Section 1 of the Sherman Act was violated is whether the defendants' several refusals to deal with plaintiff necessarily had or will have any substantial pernicious effect on the commerce concerned in the sense that an adverse effect therefrom will

be felt by the public. No such element of public injury is proven by the testimony and exhibits in the case."

(Quoted from same case in the District Court, 127 F. Supp. at pages 297 and 301, affirmed by the Second Circuit).

Third Circuit:

Hunt v. Crumboch,
143 F. (2nd) 902.

"Accordingly, the sole question for our consideration is whether the fact that the defendants' actions caused the plaintiffs to go out of business and to cease hauling in interstate commerce is such a restraint upon interstate commerce as to be cognizable under the Sherman and Clayton Acts. This question must be answered in the negative. Congress did not undertake by the enactment of the Sherman and Clayton Acts to prohibit each and every restraint upon interstate commerce. It sought to prevent only those restraints upon free competition in business or commercial transactions which tend to restrict production, raise prices or otherwise control the market in goods or services to the detriment of the public. . . It is in the public interest that the supply of commodities and services be undiminished and the cost not increased. From the standpoint of the public, however, it is immaterial whether the plaintiffs or others provide the services."

(At pages 903 and 904)

Leader v. Apex Hosiery Co.,
108 F. (2nd) 71.

"The interruption of production incurred by the appellee through the acts of the appellants had small effect upon interstate commerce. The combination was not such that by reason of the intent of the conspirators or the inherent nature of their acts public interest was prejudiced by unduly restricting competition or obstructing trade. . . . It follows, we think, that the appellants were not guilty of violating the Sherman Act . . ."

(At page 79)

Fourth Circuit:

Schwing Motor Company v. Hudson Sales Corp.,
239 F. (2nd) 176.

"The main purpose of the anti-trust laws is to protect the public from monopolies and restraints of trade, and the individual right of action for treble damages is incidental and subordinate to that main purpose. . . Public injury alone justifies the threefold increase in damages. It is essential, therefore, that the complaint allege facts from which it can be determined that the conduct charged to be in violation of the anti-trust laws was reasonably calculated to prejudice the public interest by unduly restricting the free flow of interstate commerce."

(Quoted from Opinion of District Court, 138 Fed. Supp. 899, at page 903, adopted as the Opinion of the Fourth Circuit)

Miller Motors, Inc. v. Ford Motor Company, 252 F. (2nd) 441.

"Therefore, there being no showing of any public injury resulting from a restraint of commerce in automobiles or advertising, it cannot be said that the Sherman Act has been violated."

(At page 447)

Eighth Circuit:

Riggall v. Washington County Medical Society, 249 F. (2nd) 266.

"The Sherman Anti-Trust Act was not primarily to protect the individual but to protect the general public economically, and a private party may not recover under the act unless there has been an injury to the general public economically."

(At page 268)

Ninth Circuit:

Klor's, Inc. v. Broadway-Hale Stores, 255 F. (2nd) 214.

"The purpose of the antitrust statutes is to

protect the 'public' from the harm which follows from concerted or monopolistic conduct designed to acquire control of a market, usually competitive, to which the public must ultimately resort and which conduct can be described as an undue restraint of trade. Notwithstanding the many phrases which may be picked at random out of numerous cases and, out of context, be made to support the position that concerted conduct directed at harming the opportunity of a single trader to compete is always within the prohibitions of the Sherman Act, it is our opinion that there exists the need to show facts in a motion such as this from which a court might reasonably infer 'public injury' before an antitrust violation is before the court; and, further, that the Supreme Court has not departed one whit from this requirement."

(At page 231)

Tenth Circuit:

Shotkin v. General Electric Co.,
171 F. (2nd) 236.

"It is essential to recovery in an action of this kind that plaintiff allege and prove two things, a violation of the Act, and damages to plaintiff proximately resulting from the acts and conduct of the defendants which constitute the violation of the Act. Injury to plaintiff, of itself and alone, is not sufficient to warrant a civil action of this nature for injunctive relief and damages.

There must be harm to the general public in the form of undue restri tion of trade and commerce as the result of the rongful contract, combination, or concert. . . The injury to the public need not be nationwide in geographical scope. If it involves monopolistic effect upon interstate commerce, it is enough even though it be narrow in geographical extent. . . . But it must injuriously affect public interest, and the effect must be appreciable."

(At page 238, 239)

Feddersen Motors, Inc. v. Ward,
180 F. (2nd) 519.

"But injury to plaintiff alone is not enough upon which to predicate such an action. There must be harm to the general public in the form of undue restriction of interstate commerce."

(At page 522)

The Conflict With Prior Fifth Circuit Cases

The opinion of the Circuit herein is contrary to at least two of its own previous decisions, as will appear from brief quotations therefrom.

Hudson Sales Corp. v. Waldrip,
211 F. (2nd) 268.

"In support of its second contention that the findings are clearly erroneous, appellant, citing

some of the many cases dealing with suits of this general nature, which have firmly established the principle that an essential to a private recovery is a showing of a public injury, and that only unreasonable restraints of interstate commerce, restraints which substantially affect competition or which have the purpose or effect of raising or fixing market prices, are condemned under Section 1 of the Sherman Act, points to the complete absence from the evidence of proof that defendant was guilty of any such acts."

(At pages 270, 271)

Kinnear-Weed Corp. v. Humble Oil & Refining Co.,

214 F. (2nd) 891.

"Public injury alone justifying the threefold increase in damages and being an indispensable constituent of a claim for violation of the antitrust laws, a general allegation of such injury is not sufficient. It is essential that the complaint allege facts from which it can be determined that the conduct charged to be in violation of the antitrust laws was reasonably calculated to prejudice the public interest by unduly restricting the free flow of interstate commerce."

(At pages 893, 894)

The Conflict With Prior Supreme Court Cases

The opinion of the Fifth Circuit herein is contrary to previous decisions of this Court.

Wilder Mfg. Co. v. Corn Products Ref. Co.,
236 U. S. 165.

"In other words, founded upon broad conceptions of public policy, the prohibitions of the statute were enacted to prevent not the mere injury to an individual which would arise from the doing of the prohibited acts, but the harm to the general public which would be occasioned by the evils which it was contemplated would be prevented. . ."

(At page 174)

Apex Hosiery Co. v. Leader,
310 U. S. 467.

"It is in this sense that it is said that the restraints, actual or intended, prohibited by the Sherman Act are only those which are so substantial as to affect market prices. Restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce is not enough, unless the restraint is shown to have or is intended to have an effect upon the prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition."

(At page 500)

The Necessity of Injury To The Public Interest. Injury To A Single Competitor Among Many Not Enough

As we have pointed out above, the uncontradicted proof in the record shows that the supply of the commodity remained unlimited during the operation of the supposed conspiracy, that the number of suppliers of the commodity was constantly increasing, that no member of the public had any difficulty obtaining all of the commodity desired, and that the price was fully competitive at all times. Damage to a single competitor in a highly competitive market is not sufficient to constitute a violation of Section 1 of the Sherman Act. In Apex Hosiery Co. v. Leader, 310 U. S. 469, this Court said:

> "So far as appears the delay of these shipments was not intended to have and had no effect on prices of hosiery in the market, and so was in that respect no more a restraint forbidden by the Sherman Act than the restriction upon competition in the course of trade held lawful in Appalachian Coals v. United States, 288 U. S. 344, 77 L. Ed. 825, 53 S. C., 471, Supra, because notwithstanding its effect on the marketing of coal it nevertheless was not intended to and *did not affect* the market price." (Emphasis supplied.)

The Court of Appeals of the Third Circuit in Hunt v. Crumboch, 143 F. (2nd) 902, affirmed in 325 U. S. 821, said:

> "In the light of the District Court's findings, which is supported by the evidence, that the interstate business of the A & P and the Sterling

Supply Company was not affected by the discontinuance of the Plaintiff's services, in other words, that the two companies continued to transport the same quantity of produce, foodstuffs and other products in interstate commerce as they would have done had they renewed their hauling contract with the plaintiffs, it is self-evident that in that respect the Plaintiffs have not made out a cause of action, since there was in fact no restraint of trade or commerce carried on by the A & P and the Sterling Supply Company. Accordingly, the sole question for our consideration is whether the fact that the Defendants' action caused the Plaintiffs to go out of business and to cease hauling in interstate commerce is such a restraint upon interstate commerce as to be cognizable under the Sherman and Clayton Acts. This question must be answered in the negative . . . 'The Sherman Act,' said Justice Stone in the Apex Hosiery Company case, 'was not enacted to police interstate transportation, or to afford a remedy for wrongs, which are actionable under state law, and result from combinations and conspiracies which fall short, both in their purpose and effect, of any form of market control of a commodity, such as to "monopolize the supply, control its price, or discriminate between its would-be purchasers."' (We must assume, for nothing to the contrary appears in the Plaintiffs' case, that the number of haulers available to haul produce and foodstuffs was not diminished but *simply that some other hauling concern took over the work formerly performed by the plaintiffs* and that there was no increase in

the cost of hauling traceable to the acts of the Defendants in eliminating the Plaintiffs from the field. It is in the public interest that the supply of commodities and services be undiminished and the cost not increased. *From the standpoint of the public, however, it is immaterial whether the plaintiffs or others provide the services.*)" (Emphasis supplied.)

The District Court in Schwing v. Hudson Sales, 138 Fed. Supp. 899, in an Opinion adopted by the Fourth Circuit, said:

"The main purpose of the anti-trust laws is to protect the public from monopolies and restraints of trade, and the individual right of action for treble damages is incidental and subordinate to that main purpose. Wilder Mfg. Co. v. Corn Products Co., 236 U. S. 165, 174; Glenn Coal Co. v. Dickinson Fuel Co., (4. Cir.) 72 F. 2d 885, 889. Public injury alone justifies the threefold increase in damages. It is essential, therefore, that the complaint allege facts from which it can be determined that the conduct charged to be violation of the anti-trust laws was reasonably calculated to prejudice the public interest by unduly restricting the free flow of interstate commerce. Apex Hosiery Co. v. Leader, (1940-1943 Trade Cases Par. 56,039), 310 U. S. 469; Wilder Mfg. Co. Corn Products Co., 236 U. S. 165; Glenn Coal Co. v. Dickinson Fuel Co., (4 Cir.) 72 F. 2d 885; Brosius v. Pepsi-Cola Co., (3 Cir.) 155 F. 2d 99; Kinnear-Weed Corp. v. Humble Oil and Refining Co., (5 Cir.) (1954 Trade Cases, Par. 67,822), 214 F.

2d 891, 893; Hudson Sales Corp. v. Waldrip (1954 Trade Cases, Par. 67,694) (5 Cir.), 211 F. 2d 268; Boro Hall Corp. v. General Motors Corp., 124 F. 2d 822; Feddersen Motors v. Ward, 180 F. 2d 519; Riedley v. Hudson Motor Car Co., 82 F. Supp. 8.

"In an effort to meet the requirements of these cases, plaintiffs have claimed in their amended complaints that as a result of the alleged combination and conspiracy and virtual monopoly, the public in the Baltimore area and in the State of Maryland has been injured and damaged in a number of ways.

"Subparagraph 10(A) of each complaint alleges that during the year 1952 fewer Hudson automobiles moved in interstate commerce into the State of Maryland than would have so moved if there had been no such combination and conspiracy and in particular, that Hudson refused to accept orders for some 357 new Hudson automobiles from the plaintiffs in accordance with their respective quotas. It is further alleged, on information and belief, that the 357 Hudson automobiles were not otherwise sold in the State of Maryland, from which plaintiffs draw the conclusion that 357 new Hudson automobiles did not move in interstate commerce into the State of Maryland which but for said conspiracy and combination would have so moved. There is no allegation that Hudson did not ship to plaintiffs and to its other dealers in 1952 a sufficient number of automobiles to supply all persons in the City of Baltimore and elsewhere in the State of Mary-

land who wished to buy Hudson automobiles. There is no allegation that there was any dearth in the supply of automobiles in general, or of Hudson automobiles in particular. It is not alleged that the public could not have bought as many Hudson automobiles as it wished either from Bankert or from the two other Hudson dealers in the Baltimore metropolitan area. The allegation, on information and belief, that the 357 automobiles were not otherwise sold, and that 'it is believed' that an even greater number could have been sold had it not been for the alleged conspiracy, *does not show that in 1952 the public was unable to buy at competitive prices all of the automobiles that it wished to buy*, or even that it was unable to buy at competitive prices all of the Hudson automobiles which it wished to buy.

"Subparagraph 10(b) alleges that the registration of new Hudsons in Baltimore City declined approximately 36% during the five-month period from January 1, 1953, to May 31, 1953, as a result of the unlawful combination and conspiracy. Plaintiffs compare this decline with a decline of less than 1% in an average of thirty-two states during the twelve-month period from May 31, 1952, to May 31, 1953. Several doubts immediately arise. The two periods are not comparable. The figures show merely that for one reason or another the Maryland public purchased fewer Hudson automobiles. The decrease may well have been due to *competition with other makes, which continued unabated*. It is hard to understand why Hudson should have conspired with anybody to

sell fewer Hudson automobiles. But assuming that the decrease in sales was the result of the conspiracy, it does not follow that the public was injured, or that there was any such restraint of trade as is forbidden by the anti-trust laws. In Apex Hosiery Co. v. Leader, (1940-1943 Trade Cases, Par. 56,039) 310 U. S. 469, there is a full discussion of the purpose of the act and history of the cases construing it. See particularly pages 495, et seq. One of the grounds of decision in the Apex case was that the public was not injured by the fact that 1,000 dozen pairs of Apex stockings failed to move in interstate commerce, because the conspiracy had no effect *on the market of the general commodity*, and did not give the conspiring group the power to fix prices, restrict production, or lessen quality with impunity, inasmuch as the general market remained in its normal competitive state. So, in the case at bar, the public was not injured by the alleged fact that 357 Hudson automobiles failed to move in interstate commerce, since the market *in the general commodity*, automobiles in all price ranges, remained in its normal competitive state. The Apex case emphasized market control as a prerequisite for violation of the Sherman Act. See also Appalachian Coals, Inc. v. U. S., 288 U. S. 344, 360; U. S. v. International Harvester Co., 274 U. S. 693, 704.

"The distinction between restraints which produce an effect upon the market *in a commodity generally* and those restraints which affect a relatively minor brand in a highly competitive

market of the general commodity was recognized by Judge Chesnut in Arthur v. Kraft-Phenix Cheese Corp., 26 F. Supp. 824. In that case the amended declaration alleged that the corporate defendant conspired with one of its dealers to refuse to sell its private brand products to the plaintiff, another dealer, at dealers' discount, unless plaintiff would buy out, or sell out to, the defendant dealer. The Court distinguished the case of Binderup v. Pathe Exchange, Inc., 263 U. S. 291, on the ground that the Binderup case involved defendants who controlled the 'distribution of all films' in the United States, and distinguished Eastman Kodak Co. v. Southern Photo Materials Co., 273 U. S. 359, on the ground that the monopoly there charged was the monopoly of 'the trade in photographic supplies.' Judge Chesnut said:

> 'These two cases, one illustrating a restraint of trade, and the other a monopoly of trade, are very different from the case as made in the declaration here. The articles of trade here involved are cheeses and mayonnaise of which there is common knowledge that there are many makes and brands on the market. Although the declaration alleges that the defendant corporation is the result of several combinations of other corporations, there is no allegation of any effort or attempt to monopolize the market in cheese or mayonnaise products generally. Nor is there any allegation of any combination or conspiracy between two or more manufacturers of cheese and mayon-

> naise products to deprive the plaintiff of an opportunity to deal in cheese and mayonnaise *of other manufacturers* at dealers' customary discounts.'
>
> "I conclude that the amended complaints do not show any unreasonable restraint of interstate commerce nor any monopoly forbidden by the anti-trust laws nor *any injury of the public* sufficient to support an action for treble damages under the Clayton Act. . ." (Emphasis supplied)

The Fifth Circuit in this case has been, we believe, unduly influenced by the opinion of this Court in the *Radovich* case, even though it is not cited in the opinion. That case was argued on brief and orally. The plaintiff's argument, in substance, was that *Radovich* had overruled not only the opinion of the Ninth Circuit in the case, but all previous similar decisions of the Circuit and District Courts. It was argued that after *Radovich*, treble damages could be recovered if a single competitor in a highly competitive field is injured, even if the public is not. In effect, the Fifth Circuit agreed.

In view of this, we believe it would be well, first, to analyze this Court's *Radovich* opinion to see exactly what it does hold, second, to compare it to the factual situation herein involved, and third, to consider the two Circuit Court cases decided after it, and their special relation to it.

1. In the first place, *Radovich* was a case which arose only on the pleadings, and the allegations of the complaint were necessarily accepted as true. The pleadings

charged a conspiracy to monopolize the business of professional football and to destroy its only competition and thus strengthen its monopolistic position. The complaint thereby charged primarily a violation of Section 2 of the Sherman Act.

Since the decision in 1911 in Standard Oil Co. v. U. S., 221 U. S. 1 (and see footnote 59 in U. S. v. Socony-Vacuum Oil Co., 310 U. S. 150) it has been recognized that a charge under Section 2 of the Sherman Act is automatically a charge under Section 1. In other words, a charge of monopolization is a *per se* violation of Section 1.

A number of types of conduct have been recognized by the Courts as *per se* violations. It is apparently with reference to such cases that Mr. Justice Clark, in *Radovich*, used the language on page 453 that

> "Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public."

Footnote 10, appended to this language, quotes approvingly from Apex Hosiery Co. v. Leader, to emphasize that certain forms of conduct have been "regarded as a special form of public injury." The types of conduct enumerated—restriction of production, raising of prices and market control to "the detriment of purchasers and consumers of goods and services"—are all obviously *per se* violations. All that this language seems to say is that where conduct is *per se* in violation of the Act, good intentions, or even some good results, will not prevent this conduct from being a violation.

This same point is discussed at length in Mr. Justice Douglas' opinion in U. S. v. Socony-Vacuum Oil Co., supra, especially at pages 211 to 218.

However, not all conduct claimed to be a violation of Section 1 is *per se* so. For instance, this Court in the "cellophane" case (U. S. v. DuPont, 351 U. S. 377, at page 387) said:

> "There is not, we think, any inconsistency between it (the Rule of Reason) and the development of the judicial theory that agreements as to maintenance of prices or division of territory are in themselves a violation of the Sherman Act. It is logical that some agreements and practices are invalid *per se*, while others are illegal only as applied to particular situations."

Mr. Justice Clark's reference in *Radovich* to "good intentions" and "some good results" is particularly illuminating because one of the arguments advanced by the defendant was that the "reserve clause", of which Radovich was complaining, was productive of good results, since it prevented "the strong from becoming stronger, and the weak weaker". See 231 F. (2nd) at page 622.

We believe the conclusion is obvious that *Radovich* goes no further than to hold that in a *per se* case, injury to the public interest need not be otherwise or further alleged, and that this is completely in line, not only with previous decisions of this Court, but with those decisions of the lower courts which hold that injury to the public must be shown.

Judge Barnes' remark in Klors, Inc. v. Broadway-Hale Stores, Inc., 255 F. (2nd) at page 231, that this Court in *Radovich* "has not departed one whit" from the requirement of public injury, is fully justified.

2. The instant case, however, is not a *per se* case by any stretch of the imagination. There is involved no price-fixing, no price-raising, no division of territory or customers, no agreement to refrain from competing, no agreement to reduce quality or quantity, no tying of one product to another, no monopoly, in short, none of the *per se* situations. Instead, there was at all times many, and an increasing number of, competitors, an unlimited supply of the commodity which the public could freely obtain at fully competitive prices. The case falls squarely within Mr. Justice Black's "simple example" in Northern Pacific Railway Co. v. U. S., 355 U. S. at page 653.

3. We turn now to the two appellate decisions rendered since *Radovich*. These cases are of especial significance, not only for their content and timing with reference to *Radovich*, but because of the identity of the writers of the opinions.

The opinion in Miller Motors, Inc. v. Ford Motor Co., 252 F. (2nd) 441, was written by Judge Simon E. Sobeloff, of the Fourth Circuit. Judge Sobeloff was Solicitor General when *Radovich* first came before this Court and signed the brief of the Government in support of the granting of certiorari. In the course of the opinion, Judge Sobeloff says:

> "Therefore, there being no showing of any public injury resulting from a restraint of commerce in automobiles or advertising, it cannot be said that the Sherman Act has been violated."

Radovich is not cited, although this Court's opinion was eleven months old, and Judge Sobeloff must have been aware of it. But the *Miller* case, like this one, was not a *per se* one, and Judge Sobeloff, correctly, we submit, considered *Radovich* not only not controlling, but not even pertinent.

The opinion in Klors, Inc. v. Broadway-Hale Stores, Inc., 255 F. (2nd) 214, was written by Judge Stanley N. Barnes of the Ninth Circuit. Judge Barnes was Assistant Attorney General in charge of the Anti-Trust Division, and signed the same brief as Judge Sobeloff did in *Radovich*. The opinion is an elaborate, closely reasoned and thorough analysis of the cases previous to *Radovich*, and of the *Radovich* opinion itself. We have already (page 17) quoted from the opinion and it should suffice at this point merely to say that Judge Barnes concludes, as did Judge Sobeloff, that in a non-*per se* case, it is still necessary to show an injury to the public.

The principle underlying these two cases, as well as those preceding *Radovich*, is the same as that underlying the "cellophane" case, supra, which seems to be that there is no violation if there is at all times in the relevant market an unlimited supply of interchangable commodities, competitively priced. That principle is also applicable here, for here, too, there was always an unlimited number of similar insurance policies, issued by many competing insurance companies, in a highly competitive industry, at fully competitive prices. The public could not have been injured.

It is submitted that the undisputed evidence in the record shows that there has been no violation of the Sher-

man Act, and consequently that the injury to the plaintiff did not result from such a violation. For this reason, plaintiff's treble damage action cannot be maintained.

The Propriety of Summary Judgment.

This case was begun in April of 1952. The parties took many depositions, both for discovery and for use as evidence. At least as early as November, 1954, the plaintiff knew that one of the principal points the defendants would make was the absence of public injury. The motions for summary judgment were served in May of 1956. The plaintiff had ample opportunity to procure whatever evidence it could of such public injury.

After the motions for summary judgment were made, the plaintiff could have tried to procure evidence of public injury or requested further time in which to do so, or made some showing of reasons why it was unable to do so. Rules of Civil Procedure, 56(f). The plaintiff did none of these, but instead moved for summary judgment in its favor on the question of the liability of the defendants. (Record, Vol. V, page 2705).

Where the facts which show that the plaintiff has no cause of action are undisputed after ample opportunity has been afforded the plaintiff to make a showing that a genuine issue exists as to these facts, and he does not do so, summary judgment is appropriate.

The possibility that the plaintiff may "better its case" before trial is not sufficient to render the entry of summary judgment reversible error. To allow the plaintiff to hold back its proof or to avoid summary judgment

when he fails to make a showing of a genuine issue of a material fact is contrary to the spirit of candor and the policy of disclosure which suffuses the Rules of Civil Procedure. The practice of so doing has been condemned by the Courts and by the leading text-writer, Professor Moore.

> "Nor is an opposing party, who has no countervailing evidence and who cannot show that any will be available at the trial, entitled to a denial of the motion for summary judgment on the basis of a hope that such evidence will develop at the trial."
>
> 6 Moore's Federal Practice, p. 2129.

The attitude of the Fifth Circuit on this point in the present case is surprising, in view of its previous decisions.

In Surkin v. Charteris, 197 F. (2nd) 77, the Court said, at page 79:

> "The sufficiency of the complaint does not control and, although the burden is on the moving party to demonstrate clearly that there is no genuine issue of fact, the opposing party must sufficiently disclose what the evidence will be to show that there is a genuine issue of fact to be tried. Wilkinson v. Powell, 5 Cir., 149 F. (2nd) 335; Christiansen v. Gaines, 85 U. S. App. D. C. 15; 174 F. (2nd) 534."

This is good law and should have been applied in this case to affirm, rather than reverse, the judgment of the District Court.

PRAYER

It is respectfully prayed that a writ of certiorari issue from this Court to the Court of Appeals for the Fifth Circuit, that the decision of that Court be reversed, and the judgment of the District Court be re-instated.

Respectfully submitted,

JAMES A. DIXON
908 Ainsley Building,
Miami 32, Florida,
Attorney for Petitioners.

CERTIFICATE OF SERVICE

I CERTIFY that on this _____ day of _____, 1958, a copy of the foregoing Petition for Writ of Certiorari was mailed to the following: BRUNDAGE & SHORT, 111 W. Washington Street, Chicago 2, Illinois, and WALTON, LANTAFF, SCHROEDER, ATKINS, CARSON & WAHL, DuPont Building, Miami, Florida, attorneys for Respondent BANKERS LIFE AND CASUALTY COMPANY; BRIGHAM, BLACK, NILES & WRIGHT, Brigham Building, Miami 32, Florida, attorneys for Respondent J. EDWIN LARSON; and POWELL, GOLDSTEIN, FRASER & MURPHY, Citizens and Southern Bank Building, Atlanta, Georgia, attorneys for Respondent HARTFORD ACCIDENT AND INDEMNITY COMPANY.

_____
Attorney for Petitioners.

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16494

BANKERS LIFE AND CASUALTY COMPANY,

Appellant,

versus

J. EDWIN LARSON, ET AL.,

Appellees.

Appeal from the United States District Court for the Southern District of Florida.

(June 30, 1958.)

Before HUTCHESON, Chief Judge, and TUTTLE and BROWN, Circuit Judges.

HUTCHESON, Chief Judge: This appeal is from a summary judgment[1] in a suit brought under Sec. 1 of

---

[1] As material here the judgment, reciting that motions for summary judgment had been filed (1) by plaintiff, (2) by defendant J. Edwin Larson, and (3) by the other defendants, and that the court had heard argument of counsel and had considered the pleadings, the depositions, the exhibits, the briefs and reply briefs, and, declaring:

"It is the opinion of the court upon this record: that there

the Sherman Act, as amended, 15 U.S.C. Sec. 1 and Sec. 4 of the Clayton Act, 15 U.S.C., Sec. 15, to recover treble damages for injury to plaintiff's interstate business by a conspiracy among defendants.

Here insisting that it was impossible for the district judge on this voluminous record of nearly 3000 pages, containing evidence, some at least of the tendencies of which and the inferences from which support the charges of fraud and conspiracy made in the pleadings to reach the conclusion announced by him without first, as a fact finder, deciding questions of credibility and choosing between conflicting inferences or conclusions to be drawn from the facts, appellant argues in effect, that this is just another of the all too numerous cases, *Hyman v. Regenstein*, 222 F(2) 545, and the cases it cites, in which, by affixing to a decision on the facts an impermissible summary label, the trial judge has deprived the plaintiff of his right of trial by jury and proved once again the truth of the time worn adage that the longest way around is often the shortest way through. *Lockes, Inc. v. Bays*, 209 F(2) 610, at p. 615.

Pointing out that extensive use of pretrial discovery procedure was made by all parties resulting in the pro-

---

is no genuine issue as to a material fact that, as a matter of law, the undisputed facts are legally insufficient to show a conspiracy as charged in the complaint between defendant J. Edwin Larson and Zack Cravey, or any other defendant; that inasmuch as the claim of the plaintiff against the remaining defendants * * *is predicated upon the existence of such a conspiracy, plaintiff is not entitled to recover against any defendant; and that the case is one for summary judgment."
denied plaintiff's motion for summary judgment and granted defendant Larson's motion and that of the other defendants.

duction of many depositions and documents, appellant urges upon us that in stating in his opinion: "The undisputed facts are legally insufficient to show a conspiracy as charged in the complaint.", the district judge really tried the case on the facts and reached his conclusion by the process of rejecting for reasons not stated by him all evidence[2] and all inferences which ran counter to what he considered to be the admitted or undisputed facts.

---

[2] In his brief, appellant thus sums up the plan of the conspiracy and the method of carrying it out:

"The facts upon which plaintiff predicates the existence of a conspiracy are revealing of gross contempt for legal limitations on official authority and a shockingly mercenary attitude toward bribery and corruption. What on the surface professedly was conceived as a program of cooperative regulation of plaintiff, on examination stands unmasked as a nefarious scheme to destroy plaintiff's business for the benefit of the Sammons controlled corporations.

"Thus there was presented for determination by a jury not by the court as a matter of law a genuine issue as to the material fact whether Larson and Cravey, in good faith and with no intent to benefit the Sammons controlled corporations, engaged in and did not overstep the bounds of a program of cooperative regulation of plaintiff, or whether, under the guise of cooperative regulation but in reality for the benefit of the Sammons controlled corporations, they and the corporations conspired to destroy plaintiff's business in Georgia, Florida and other states and to prevent its expansion into states where it was not licensed.

"In the beginning Larson and Cravey apparently joined forces nominally to regulate, and to induce other Insurance Commissioners to regulate, the relationship of plaintiff to the public of the respective states comprising Zones 2 and 3 of a voluntary association known as the National Association of Insurance Commissioners, which frequently is referred to as NAIC. Ostensibly, then, there were at the outset legal and proper motives and purposes. The means employed were of another character.

* * * * *

"The means of purported regulation were threats and the instigation of threats that plaintiff's licenses to do business would not be renewed, or actual refusal or renewal of licenses, at such times and in such ways as would facilitate carefully planned and highly successful concerted efforts by the Sammons controlled corporations to obtain the agency forces and thus the business of plaintiff in various states. To that end Larson and Cravey enlisted

Setting out in his brief in support of his claim, references, to the report and actions of the committee appointed to investigate plaintiff, to extracts from the discovery deposition of Larson, to the correspondence between Cravey and Larson, to what is referred to as the Atlanta meeting of the commissioners on July 18, 1951, and to actions taken by Larson and Cravey against the plaintiff in Florida and Georgia, appellant thus concludes his argument:

> "On the basis of the foregoing, which necessarily omits many details, plaintiff urges that there were presented for determination by a jury and not by the court as matter of law at least the following genuine issues as to material facts:
>
> "1. Did Larson, Cravey and the Sammons controlled corporations conspire to destroy plaintiff's business in Georgia, Florida, and other states and to prevent its expansion into states where it was not licensed?
>
> "2. If Larson was not a conspirator, did Cravey and the Sammons controlled corporations so conspire?
>
> "3. If neither Larson nor Cravey was a conspirator, did the Sammons controlled corporations so conspire among themselves?"

the aid of Commissioners of other states, so that the scheme of the conspiracy became national in scope. The Sammons controlled corporations maintained the adherence and cooperation of Larson and Cravey through bribery of commissioners and their employees. Officials of these corporations were active participants in diagramming both the scheme and moves which would assure its success for the benefit of the corporations.'"

Insisting that it is impossible to determine from the court's terse statement whether, by ignoring or finding contrary to them, the lower court rejected the facts relied on by plaintiff, appellant cites and quotes from *Dulansky v. Iowa-Illinois Gas & Electric Co.*, 191 F.2d 881, at p. 884:

> "It is apparent from a consideration of the court's findings and conclusions that in determining whether or not there was a genuine issue of fact the court gave no thought to what inferences might reasonably be drawn from the circumstances. The case is largely dependent upon circumstantial evidence. The court also failed to view the evidence, as it should, in a light most favorable to the plaintiffs."

While making common cause against appellant in repelling his assault upon the summary judgment, Larson and his co-defendants, the insurance companies, filed separate briefs in which the approach of each was quite different. Larson, drawing protectingly about himself the cloak of his claimed official immunity from suit for his actions as a state officer, from the assumed vantage point of his claimed untouchability, attacks plaintiff and his cause in language more denunciatory than convincing, more calculated to generate heat than light. In short, instead of meeting the burden cast upon him under this record of showing by argument and discussion that, in disposing of the case by summary judgment, the district court did not deprive plaintiff of his constitutional right of trial by jury, appellee Larson seeks, in part, to do so by sweeping animadversions upon the good faith of plaintiff and his claims. Assuming the very issue which is pre-

sented for determination, whether as matter of law the acts complained of by plaintiff as done by Larson were official acts done for the purpose alone of carrying out his official duties and, therefore, he was immune from suit as to them, and not personal acts done as a part of a conspiracy against plaintiff, appellee Larson,—though the district judge did not give this as a reason for his decision and the record does not show plainly, if at all, that as a matter of law this is so—devotes the greater part of his brief to putting forward this claim of immunity.

The other appellees, while putting forward and arguing the same proposition, that concerted official action by agreement between state officials is not within the scope of the prohibitions of the Sherman Act because such prohibitions are directed against private persons' actions and not against actions of state officials, and presenting their case in less ex cathedra, less pontifical and less hortatory fashion, make the additional points set out below in favor of the correctness of the judgment.

---

(1) The complaint does not allege and the proof does not show any injury to the public, in fact the record shows the contrary.

(2) There is no proof in the record that Mr. Larson and Mr. Cravey engaged in a conspiracy against the plaintiff.

(3) There is no proof in the record that the insurance companies joined in the supposed pre-existing conspiracies between Larson and Cravey with knowledge of the existence of such conspiracies.

(4) If Bradley, one of the Vice-Presidents on whose actions and statements plaintiff's claim is to some extent based, did join in any illegal agreement, he had no authority to do so from the defendant companies and his actions cannot be imputed to them.

(5) They attack, as inadmissible, some of the evidence relied on by plaintiff, including the transcript of the meeting of insurance commissioners and the so-called Bradley reports to his employer.

Proceeding under these heads in a lengthy brief of more than 100 pages, replete with inferences and conclusions drawn from the swollen record as a whole, they seem to us to argue the case as though it had been fully tried below and the question presented for discussion here was whether a verdict or judgment based upon such a trial should or should not be set aside as without evidence to support it, rather than, as in fact is the case here, whether as matter of law there was or was not a genuine issue as to a material fact, and the case was or was not properly disposed of on summary judgment.

Apparently assuming that on a trial the plaintiff could not have bettered its case, the appellees present their case as thought this court must either affirm the judgment out of hand or take upon itself the burden of searching the 3000 pages of record to find therein some justification for a judgment which neither the district judge, by opinion or findings, nor the appellees, by brief, have convincingly pointed out.

We cannot agree with this view. On the contrary, viewing the record as a whole and without a line by line examination of it, we are of the opinion that this case is in its nature not susceptible of being disposed of by summary

---

In addition to these points, a special point is made by the Hartford Indemnity Co., sued as surety of Cravey, that the surety is liable only when the principal is liable and that Cravey, the principal, is not liable either at common law or under any applicable Georgia statute, and the bond does not run to, or cover actions of the kind brought here.

judgment and that, saying so, we could, without more, order the judgment reversed and the cause sent back for trial on the merits.

However, though in the posture of this case, by the failure of the district judge to make and file an opinion or in any other way support his summary disposition of this complicated case, we have been deprived of his aid and assistance, we have, in the light of the briefs, the arguments and the record examined his meager conclusions sufficiently to satisfy ourselves: that no adequate showing has been made that there is any basis in the record for his conclusion that, though a case was stated in the pleadings, the plaintiff was as matter of law not entitled to a trial of the issues tendered in them; and that he erred in his conclusion and in the judgment entered thereon.

Of appellees' point one, of which they make so much in citing and discussing the cases, that the complaint does not allege and the proof does not show any injury to the public and for that reason no case for relief is presented, it is sufficient to say that in our opinion, as applied to this

---

4 Cf. Whitaker v. Coleman, 115 F(2) 305; and Winter Park v. Southern Bell, 181 F(2) 341, where the court said:

"We are of the opinion that this case is not one that readily lends itself to such a summary disposition.

"The facts and circumstances, although in no material dispute as to their actuality, reveal aspects from which inconsistent hypotheses might reasonably be drawn and as to which the minds of reasonable men might differ.

"The drawing of inferences and the acceptance of hypotheses arising out of the facts are ordinary attributes that the judicial process has conferred upon the finder of the facts."

case, appellees have completely misconceived and misapplied the principle they invoke. As to the complaint, there are clear, definite and full allegations that the conspiracy charged against the defendants was for the purpose and with the result not only of unlawfully restraining plaintiff's trade and commerce among the several states but of suppressing, burdening and obstructing interstate commerce, thus alleging at once both public and private injury.

As to proof, we think it quite clear that here, as in other aspects of the case, appellees have not borne their burden of demonstrating that as matter of law there was no evidence which, if taken in the light most favorable to plaintiff, tended to establish the truth of its allegations.

On the point so strongly relied on by all appellees, that Larson, because of his official position as a state officer, is immune from accountability in this suit, it is sufficient to say that there is no authority, statutory or otherwise, authorizing the insurance commissioners of Georgia or Florida to conspire with persons to restrain commerce or exempting them from suit if they do so,[5] and that Mr. Larson's vigorous denial of responsibility is really based not on any claim that if he did conspire he would nevertheless be immune but on his insistence that everything he did was in the line of duty and within the scope of his authority, as a state officer and not as a conspirator, and that as matter of law there is no evidence to the contrary.

[5] Cf. Standard Oil Co. of Calif. vs. Moore, 251 F.(2) 188; Parker v. Brown, 317 U.S. 341; Floyd v. Gage, 192 F.(2) 137.

Because the case was erroneously disposed of by summary judgment, the judgment is REVERSED and the cause is REMANDED for further and not inconsistent proceedings, including trial on the merits.

A true copy

Test: s/ EDWARD W. WADSWORTH

Clerk, U. S. Court of Appeals, Fifth Circuit
New Orleans, Louisiana
(SEAL)

APPENDIX B

JUDGMENT.

Extract from the Minutes of June 30, 1958.

No. 16494.

BANKERS LIFE AND CASUALTY COMPANY,

versus

J. EDWIN LARSON, ET AL.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel:

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further and not inconsistent proceedings, including trial on the merits:

It is further ordered and adjudged that the appellees, J. Edwin Larson, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

APPENDIX C

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal: Provided, That nothing contained in Sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the

court. July 2, 1890, c. 647, section 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693.

Section 1 of the Sherman Act, 15 U. S. C., Section 1.

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, section 4, 38 Stat. 731.

Section 4 of the Clayton Act, 15 U. S. C., Sec. 15.

LE COPY

Office-Supreme Court, U.S.
FILED
SEP 8 1958
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

RESERVE LIFE INSURANCE COMPANY, GEORGE WASHINGTON LIFE INSURANCE COMPANY, and PROFESSIONAL INSURANCE CORPORATION,
Petitioners,

vs.

BANKERS LIFE AND CASUALTY COMPANY, J. EDWIN LARSON and HARTFORD ACCIDENT AND INDEMNITY COMPANY,
Respondents.

No. 272.

BRIEF

Of Respondent, Hartford Accident and Indemnity Company, in Response to Petition for Writ of Certiorari.

M. F. GOLDSTEIN,
B. D. MURPHY,
ROBERT E. COLL,
Attorneys for Respondent, Hartford Accident and Indemnity Company.

1130 Citizens and Southern National Bank Building,
Atlanta 3, Georgia.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

INDEX.

	Page.
Introduction	1
Argument	2
Conclusion	3
Certificate of service	3

Cases Cited.

Apex Hosiery Co. v. Leader, 310 U. S. 469, 84 L. Ed. 1311	2
Crummer Co. v. DuPont, 223 Fed. 2d 238, pp. 244 and 245 (C. C. A. 5)	2
Hudson Sales Corp. v. Waldrip, 211 Fed. 2d 268 (C. C. A. 5)	2
Kinnear-Weed Corp. v. Humble Oil & Refining Co., 214 Fed. 2d 891 (C. C. A. 5)	2
Parker v. Brown, 317 U. S. 341, 87 L. Ed. 315	2

Statutes Cited.

15 U. S. C. A., Sec. 1	2
15 U. S. C. A., Sec. 15	2

IN THE

SUPREME COURT OF THE UNITED STATES.

RESERVE LIFE INSURANCE COMPANY, GEORGE WASHINGTON LIFE INSURANCE COMPANY, and PROFESSIONAL INSURANCE CORPORATION,

Petitioners,

vs.

No. 272.

BANKERS LIFE AND CASUALTY COMPANY, J. EDWIN LARSON and HARTFORD ACCIDENT AND INDEMNITY COMPANY,

Respondents.

BRIEF

Of Respondent, Hartford Accident and Indemnity Company, in Response to Petition for Writ of Certiorari.

INTRODUCTION.

The Court of Appeals for the Fifth Circuit reversed the judgment of the United States District Court for the Southern District of Florida, Miami Division, which had granted motions for summary judgment filed by the parties defendant. Reserve Life Insurance Company, George Washington Life Insurance Company and Professional Insurance Corporation, petitioners for the writ of certiorari here, this respondent and J. Edwin Larson, who is Insurance Commissioner of Florida, were named as parties defendant in the trial court. This respondent has filed a cross-petition for certiorari.

The opinion of the Fifth Circuit, the grounds upon which jurisdiction of this court is invoked, the statement of the case, and the questions presented for review are fully set forth in the petitioner's petition for writ of certiorari.

ARGUMENT.

This respondent has reviewed the arguments and cases cited in the petitioner's petition for writ of certiorari and concurs with the view of petitioners that a writ of certiorari should issue from this court to the Court of Appeals for the Fifth Circuit and that the decision of that court should be reversed and the judgment of the District Court be reinstated.

This respondent further believes that the opinion of the Fifth Circuit is erroneous and contrary to opinions of this Court and previous opinions of the Fifth Circuit and that certiorari should be granted in this case for the following reasons:

This suit is brought under the provisions of Section 1 of the Sherman Act (15, U. S. C. A., Sec. 1) and Section 4 of the Clayton Act (15, U. S. C. A., Sec. 15). The complaint attempts to allege a conspiracy between J. Edwin Larson, Insurance Commissioner of the State of Florida, and Zack D. Cravey, Insurance Commissioner of the State of Georgia, which conspiracy the Plaintiff claims to be a violation of said Section 1, giving rise to an action for treble damages under Section 15. The statute does not apply to State action or the action of State officials. (**Parker v. Brown**, 317 U. S. 341, 87 L. Ed. 315; **Apex Hosiery Co. v. Leader**, 310 U. S. 469, 84 L. Ed. 1311.)

It is an essential ingredient of a cause of action for treble damages on account of acts alleged to violate Section 1 of the Sherman Act that the complaint allege in detail facts showing that, as a result of the alleged combination or conspiracy, the general public has suffered some injury of a type forbidden by the statute. (**Crummer Co. v. DuPont**, 223 Fed. 2d 238, pp. 244 and 245 [C. C. A. 5]; **Kinnear-Weed Corp. v. Humble Oil & Refining Co.**, 214 Fed. 2d 891 [C. C. A. 5]; **Hudson Sales Corp. v. Waldrip**, 211 Fed. 2d 268 [C. C. A. 5].)

The complaint fails to allege any such public injury as would constitute a violation of Section 1 of the Sherman Act, and none of the depositions taken herein by either party demonstrate any such public injury. On the contrary, the evidence completely disproves any such public injury.

A comparison of the pleadings in the cases from the Fifth Circuit, cited above, and those in the cases from this Court, cited above, clearly demonstrate that in reversing the judgment of the District Court, the Fifth Circuit made a radical departure from its own holdings and that the decision clearly is contrary to the holdings of this Court in cases involving the questions here involved.

CONCLUSION.

It is respectfully submitted that a writ of certiorari should issue from this Court to the Court of Appeals for the Fifth Circuit, and that the decision of that court should be reversed and that the judgment of the District Court should be reinstated.

.....

M. F. GOLDSTEIN,

.....

B. D. MURPHY,

.....

ROBERT E. COLL,

Attorneys for Respondent, Hartford Accident and Indemnity Company.

Certificate of Service.

I Certify that on this .... day of ....., 1958, a copy of the foregoing Brief was mailed to the following: Brundage & Short, 111 W. Washington Street,

Chicago 2, Illinois, and Walton, Lantaff, Schroeder, Atkins, Carson & Wahl, DuPont Building, Miami, Florida, attorneys for Respondent Bankers Life and Casualty Company; Brigham, Black, Niles & Wright, Brigham Building, Miami 32, Florida, attorneys for Respondent J. Edwin Larson; and James A. Dixon, 908 Ainsley Building, Miami 32, Florida, attorney for Petitioners Reserve Life Insurance Company, George Washington Life Insurance Company, and Professional Insurance Corporation.

.....

Attorney for Respondent.

LE COPY

SEP

Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 272 and 377

RESERVE LIFE INSURANCE COMPANY, ET AL.,
Petitioners,

vs.

BANKERS LIFE AND CASUALTY COMPANY, ET AL.,
Respondents.

BRIEF ON BEHALF OF RESPONDENT BANKERS LIFE AND CASUALTY COMPANY

IN OPPOSITION TO PETITION AND CROSS-PETITION FOR WRIT OF CERTIORARI.

CHARLES F. SHOET JR.,
111 West Washington Street,
Chicago 2, Illinois,

MILLER WALTON,
910 Alfred I. du Pont Building,
Miami 32, Florida,

Attorneys for Respondent,
Bankers Life & Casualty Company.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
Argument	1
The Petition	1
The Conspiracy	3
Public Injury	6
The Radovich Case	14
The Propriety of Summary Judgment	16
Cross-Petitioner's Claims	16
The McCarran Act	17
The Georgia Insurance Commissioner	18
Conclusion	19

Table of Authorities Cited.

Cases.

Associated Press v. U. S., 326 U. S. 1, 65 S. Ct. 1416, 65 L. ed. 284	11
Culpepper v. U. S. Fidelity & Guaranty Co., 199 Ga. 56, 33 S. E. 2d 168	17
Fashion Originators' Guild v. Federal Trade Commission, 312 U. S. 457, 61 S. C. 703	10
Feddersen Motors, Inc. v. Ward, 180 F. 2d 519	13
Wm. Filene's Sons Co. v. Fashion Originators' Guild, 90 F. 2d 556	12
Hudson Sales Corp. v. Waldrip, 211 F. 2d 268	13
Hunt v. Crumboch, 326 U. S. 82, 65 S. C. 1545	11
Interborough News Company v. The Curtis Publishing Co., 225 F. 2d 289	12
Kinnear-Weed Corp. v. Humble Oil and Refining Co., 214 F. 2d 891	13

Klon's, Inc, v. Broadway-Hale Stores, 255 F. 2d 214.. 13
Larson v. Bankers Life and Casualty Co., Fla., 64 So. 2d 322 6
Leader v. Apex Hosiery, 108 F. 2d 71..... 12
Miller Motors, Inc. v. Ford Motor Company, 252 F. 2d 441 13
Radovich v. National Football League, 352 U. S. 445.. 14
Riggall v. Washington County Medical Society, 249 F. 2d 266..... 13
Schwing Motor Company v. Hudson Sales Corp., 239 F. 2d 176..... 13
Shotkin v. General Electric Co., 171 F. 2d 236..... 13
Solo Electric Co. v. Jefferson Electric, 117 U. S. 173.. 18
United States v. South-Eastern Underwriters Ass'n., 322 U. S. 533..... 8
Zachry v. City Council of Augusta, 78 Ga. App. Reports 746 17

Other Authorities.

Georgia Statutes, Section 89-418..... 17
Section 1 of Sherman Act, 15 U. S. C., Sec. 1..... 2
Section 4 of the Clayton Act, 15 U. S. C., Sec. 15..... 2
U. S. C. A., Title 15, Section 32..... 5
U. S. C. A., Title 15, Sections 1011-1015..... 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 272.

RESERVE LIFE INSURANCE COMPANY, ET AL.,
Petitioners,

vs.

BANKERS LIFE AND CASUALTY COMPANY, ET AL.,
Respondents.

BRIEF ON BEHALF OF RESPONDENT BANKERS LIFE AND CASUALTY COMPANY

IN OPPOSITION TO PETITION AND CROSS-PETITION FOR WRIT OF CERTIORARI.

ARGUMENT.

---

1. THE PETITION.

Respondent Bankers Life and Casualty Company, herein called "Bankers", respectfully submits that the petition does not make a showing sufficient to invoke the exercise by this Court of its sound judicial discretion to grant review on Writ of Certiorari.

The petition contends that a summary judgment ren-

dered by the District Court should not have been reversed by the Court of Appeals.

It seeks to have this Court undertake to review hundreds of pages of depositions, affidavits and evidentiary exhibits for the purpose of determining whether the Court of Appeals was right in deciding that the record presented genuine issues as to material facts triable only "on the merits" and not on motions for summary judgment.

The summary judgment was against Bankers as plaintiff in an action under Section 1 of the Sherman Act, as amended, 15 U. S. C. Section 1,[1] and Section 4 of the Clayton Act, 15 U. S. C. Section 15.[2]

It was brought to recover treble damages for injury to Bankers' interstate insurance business resulting from a conspiracy among petitioners, respondent Larson and others.

Petitioners inferentially admit the conspiracy. They also inferentially admit that it injured Bankers' interstate insurance business. This injury, they say, was only a *private injury* as distinguished from *injury to the public.*

Arguing that it was necessary for Bankers to show both private and public injury, and pointing to affidavits submitted in support of the Motions for Summary Judgment, petitioners assert that the affidavits proved conclusively that the conspiracy had not injured the public.

In disposing of this contention the Court of Appeals said (Petition, Appendix "A", pp. 8-9):

"Of appellees' point one, of which they make so much

1. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *."

2. "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws * * * shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

in citing and discussing the cases, that the complaint does not allege and the proof does not show any injury to the public and for that reason no case for relief is presented, it is sufficient to say that in our opinion, as applied to this case, appellees have completely misconceived and misapplied the principle they invoke. As to the complaint, there are clear, definite and full allegations that the conspiracy charged against the defendants was for the purpose and with the result not only of unlawfully restraining plaintiff's trade and commerce among the several states but of suppressing, burdening and obstructing interstate commerce, *thus alleging at once both public and private injury.*

"As to proof, we think it quite clear that here, as in other aspects of the case, appellees have not borne their burden of demonstrating that as matter of law there was no evidence which, if taken in the light most favorable to plaintiff, tended to establish the truth of its allegations." (Emphasis supplied.)

This disposition of petitioners' contention obviously does not conflict with any decision cited in the petition. Neither does it call for an exercise of this Court's power of supervision. There is nothing in the case to invoke the exercise of sound judicial discretion to grant review.

2. THE CONSPIRACY.

Even a brief summary of the history, nature and consequences of the conspiracy demonstrates conclusively that the disposition of petitioners' contention by the Court of Appeals was right.

When the action was commenced on April 24, 1952 and a jury trial demanded (I, 26),[3] Bankers was an insurance company writing life, health and accident, and hospitaliza-

3. This is a reference to Volume I of the record, page 26. Subsequent record references usually are in the same form.

tion insurance in 31 states through more than 4,000 agents and employees. (I, 5-8.)

The former defendant Zack D. Cravey and respondent Larson are, respectively, Insurance Commissioners of the States of Georgia and Florida. Cross-petitioner Hartford Accident and Indemnity Company was the surety on the official bond of Commissioner Cravey of the State of Georgia.

Petitioners are members of a group of insurance companies controlled and dominated by one C. A. Sammons. The former defendant C. C. Bradley was vice president of petitioner Reserve Life Insurance Company.

Inasmuch as no point is raised in the petition relative to the conspiracy itself, it is sufficient to point out as background that the plan was for Commissioners Cravey and Larson under the guise of regulation, to eliminate Bankers as a competitor in Georgia, Florida and elsewhere; to throw its agency plants and business to petitioners and by enlisting the aid of other Commissioners prevent its expansion into other states.

The conspiracy is revealing of gross contempt for legal limitations on official authority and a shockingly mercenary attitude toward bribery and corruption.

The means of purported regulation were threats and the instigation of threats that Bankers' license to do business would not be renewed, or actual refusal of renewal licenses,[4] at such times and in such ways as would facilitate carefully planned and highly successful concerted efforts by the Sammons controlled corporations (Petitioners) to obtain the agency forces and thus the business of Bankers

4. "Counsel for the Commissioner * * * sought to draw a distinction between revocation and refusal to renew a license. There is no difference in substance between the two." *Bankers Life & Casualty Co.* v. *Cravey*, 208 Ga. 682, 69 S. E. 2d 87, 90 (1952).

in various states. (I, 10-19.) To that end Larson and Cravey enlisted the aid of Commissioners of other states, so that the scheme of the conspiracy became national in scope. (I, 9, 13-15, 20-21.) The Sammons controlled corporations maintained the adherence and cooperation of Larson and Cravey through bribery of commissioners and their employees. (I, 16.) Officials of these corporations were active participants in diagramming both the scheme and moves which would assure its success for the benefit of the corporations. (I, 15, 18, 22.) Sammons refused to answer on the grounds of the Fifth Amendment, questions concerning bribery of Cravey, Larson, and other insurance officials.[5] Sammons likewise refused to answer on the ground of self-incrimination, a question as to whether he had received a report from Bradley in 1951 to the effect that cooperation for the corporate conspirators (petitioners) had been secured by the payment of sums of money to insurance department officials in the states where the companies operated. (I, 161, 162, 163, 165, 166.) Nevertheless, petitioners' well-planned secret campaign of bribery of employees of Cravey and other public officials is demonstrated in the record. (I, 430; II, 559 through 572, 576; IV, 1945, 1951.)

The conspiracy was wholly successful in Georgia where Bankers has been at all times since July, 1951 and still is prevented from writing insurance and having agents,[6]

5. An objection to the question and instruction to the witness not to answer on the grounds that the answer might tend to incriminate him, first appears in Vol. I at page 161. Thereafter it was referred to as "same objection and same instruction" to the witness. (I, 162 *et seq.*); No such privilege was legally available to witness. Title 15, Section 32, U. S. C. A.

6. *Bankers Life & Casualty Co.* v. *Cravey*, 208 Ga. 682, 69 S. E. 2d 87, (1952); *Cravey* v. *Bankers Life & Casualty Co.*, 209 Ga. 273, 71 S. E. 2d 659, (1952); *Bankers Life & Casualty Co.* v. *Cravey*, 209 Ga. 274, 71 S. E. 2d 659, (1952); *Bankers Life & Casualty Co.* v. *Cravey*, 210 Ga. 239, 78 S. E. 2d 507, (1953); 90 Ga. App. 113, 82 S. E. 2d 150, (1954).

and to a large and damaging extent in Florida, Pennsylvania, and elsewhere. The only thing that saved Bankers' business from extinction in Florida was that the Florida litigation prevented Larson from carrying through fully his portion of the scheme (V, 2513-20); *Larson* v. *Bankers Life and Casualty Co.*, Fla., 64 So. 2d 322 (1953). Even then, press releases by Cravey falsely stated that Bankers had lost its licenses in Florida and Iowa. (III, 1358-60, Pl. Ex. 4, particularly on page 1360, the concluding sentence of the newspaper clipping.)

This terse summary of the evidence contained in the more than 3000 pages of the record emphasizes the validity of the Court of Appeals' finding that Bankers was entitled to have a jury pass upon the issues of the case.

3. PUBLIC INJURY.

The petition for certiorari seeks to invoke this Court's interest by portraying the lower Court's opinion as inconsistent with and contrary to the reported decisions of this Court and of eight Courts of Appeal. Reference to all of the facts and not merely those culled by petitioners in an earnest effort to advance their best legal foot forecloses the conclusion that the Court of Appeals has trespassed in the manner attributed to it by petitioners.

It should be noted that the issue of "public injury" was advanced by the petitioners in the District Court, but was ignored by that Court in its disposition of the case. The Court of Appeals, in dealing with this facet of petitioners' argument, found that the complaint charged both public and private injury and that the evidence when taken in the light most favorable to the plaintiff tended to establish the truth of the allegations.

These findings of the Court of Appeals are not disputed in the petition. Indeed they cannot be disputed against the

background of the conspiratorial meetings; the interchange of "Personal," "Confidential," and "Not for File" messages; the careful meshing of petitioners' activities directed at capturing Bankers' business in Georgia and elsewhere with Cravey's actions in putting Bankers out of business in Georgia; the bribery of insurance department officials and employees; and the spectacle of the controlling figure in petitioners' corporate set-up advancing an ill-founded claim of the privilege against self-incrimination in reply to questions concerning these acts of bribery. There can be no question that interstate commerce in a substantial amount was suppressed, burdened, and obstructed as a result of petitioners' activities.

Bankers lost an agency force of one hundred and eleven men in Georgia alone (V. 2714) valued at a figure in excess of three million dollars (V. 2723). In that same state, Bankers at the time of the actions complained of in 1951 accounted for almost 1/3 of the total premiums paid in the state for accident and health insurance excluding non-cancellable policies. (V. 2775.) The dollar value of these premiums was substantial. In that same year, the premiums were in excess of a million dollars. (V. 2775.) Petitioners during this same period, considered as a group, were slightly ahead of Bankers in both percentage and dollar volume.

In discussing the effect of the refusal to renew the Georgia license, the State Supreme Court said:[7]

> "• • • Beyond doubt the company's operation in this State has been mutually beneficial to the company, the State and the people of the State. It has approximately 87,000 policyholders and 75 soliciting agents in Georgia. During the first six months of 1951 the company paid to its policyholders in Georgia $241,529.45. In February of 1951 it paid to the defendant

7. *Bankers Life & Casualty Co. v. Cravey*, 208 Ga. 682, 69 S. E. 2d 87, 89 (1952).

> Insurance Commissioner $300 as the annual fee for the renewal of its license for the fiscal year beginning July 1, 1951, and $18,000 in taxes. This mutually beneficial operation has been abruptly terminated by the Insurance Commissioner * * *."

This beneficial interstate insurance operation has been at all times since July, 1951, and still is, completely suppressed in the state of Georgia.

Because Bankers has not had and does not have agents in Georgia, the interstate servicing of the approximately 87,000 policies held in that state has been and still is burdened and obstructed. These policyholders have been and are deprived of local agents to assist in servicing the policies, claims and collections of premiums.

The people of the state of Georgia have been and are deprived of the right to obtain Bankers' policies.

The economy of the state of Georgia has been and is deprived of the economic benefit of the compensation formerly paid by Bankers to its Georgia agents and other employees.

The state of Georgia has been deprived of approximately $2,100.00 in license fees which Bankers would have paid if its interstate insurance business had not been completely suppressed in that state.

The state of Georgia also has been deprived of approximately $126,000.00 in taxes which Bankers would have paid if its interstate insurance business had not been completely suppressed in that state.

The "continuous and indivisible stream of intercourse among the states composed of collections of premiums, payments of policy obligations, and the countless documents and communications which are essential to the negotiation and execution of policy contracts"[8] has been suppressed, burdened and obstructed in the state of Georgia.

---

8. *United States* v. *South-Eastern Underwriters Ass'n.*, 322 U. S. 533, 541.

Georgia is a classic example clearly set forth in the pleadings, depositions, and exhibits in the record. Petitioners' conspiracy was nationwide in its scope with less success in other states but in scheme and execution clearly a restraint and interference with interstate commerce. Two such examples shown by the record are the states of Florida and Pennsylvania.

Petitioners' sole rejoinder to these unassailable facts is that the number of insurance companies doing business in Georgia and Florida increased during that period of the conspiracy.

For the year ending June 30, 1951, fifty companies were licensed in the State of Georgia to write this type of insurance. (IV, 2062.) The succeeding year saw seventy-seven companies so licensed. (IV, 2068.) During these periods, eleven of the companies so licensed were Georgia companies. It is apparent that, with so many companies in the field, a battle between companies doing over eight percent of this business with the dollar volume involved was, inevitably, a battle of giants.

The figures become even more impressive applied to the situation in Florida. There, in 1951, Bankers had a volume in excess of two million two hundred thousand dollars, over nine percent of the total premiums received from one hundred and forty-two companies licensed to write accident and health insurance in Florida. (IV, 2656, 2775.) Petitioners, again considered as a group, were again slightly over these figures. In terms of dollar volume and economic significance then, the interstate commerce involved was substantial.

Not one of the cases cited by petitioners sustains the proposition that the public is not injured by the suppression of competition implicit in the elimination of a competitor by his or its competitors pursuant to a conspiracy. The claimed inconsistency between the Court of Appeals

decisions and the decisions of this Court simply do not exist.

The result of this was the elimination of plaintiff as a competitor in Georgia and substantial damage to its ability to compete elsewhere. This affected all policyholders of Bankers regardless of where they lived. As was stated in *United States* v. *Southeastern Underwriters Ass'n.*, 322 U. S. 533, 541:

> "Individual policyholders living in many different states who own policies in a single company have their separate interests blended in one assembled fund of assets upon which all are equally dependent for payment of their policies. The decisions which that company makes at its home office—the risks it insures, the premiums it charges, the investments it makes, the losses it pays—concern not just the people of the state where the home office happens to be located. They concern people living far beyond the boundaries of that state."

The competitive relationship existing *vis a vis* the conspirators and plaintiff brings the conspiracy and injury to plaintiff within the area of public interest—the public is entitled to competition by all and the elimination of a competitor in violation of the Sherman Act does affect that interest. Reduced to an absurdity, petitioners argue that as long as individual companies are picked off, one by one, only at that point where monopoly begins may an action be brought. That is true of a Section 2 action, but a Section 1 action under the Sherman Act reaches restraints on competition prior to the achievement of monopoly. Plaintiff has sufficiently shown a situation affecting the public interest, operating to the public's injury.

In *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U. S. 457, 465, 61 S. C. 703, 707, this Court emphasized:

> "Under the Sherman act 'competition, not combina-

> tion, should be the law of trade.' * * * And among the many respects in which the Guild's plan runs contrary to the policy of the Sherman Act are these: it narrows the outlets to which garment and textile manufacturers can sell and the sources from which retailers can buy * * *."

Also in *Hunt v. Crumboch*, 325 U. S. 821, 824, 65 S. Ct. 1545, 1546, a union case following the *Apex* case, the Court differentiated the situation:

> "Had a group of petitioner's business competitors conspired and combined to suppress petitioner's business by refusing to sell goods and services to it, such a combination would have violated the Sherman Act."

Similar sentiments were expressed in *Associated Press v. U. S.*, 326 U. S. 1, 14; 65 S. Ct. 1416, 1422; 65 L. ed. 2[illegible]:

> "The Sherman Act was specifically intended to prohibit independent businesses from becoming 'associates' in a common plan which is bound to reduce their competitor's opportunity to buy or sell the things in which the groups compete."

This case had another facet paralleled in the case at bar. The defendants in the cited case contended that the proof had failed to show that the press services were indispensable, since the services were available to the public, provided that the public bought a member's newspaper.

This argument finds its counterpart in the claim of defendants that no public injury exists because of the existence of other companies willing to sell similar policies to the public involved. Petitioners would have Bankers prove its "indispensability" in the insurance market, a test which in the *Associated Press* case the Supreme Court disavowed in strong terms (p. 18):

> "We reject these contentions. The proposed 'indispensability' test would fly in the face of the language of the Sherman Act and all our previous interpreta-

> tions of it. Moreover, it would make that law a dead letter in all fields of business, a law which Congress has consistently maintained to be an essential safeguard to the kind of private competitive business economy this country has sought to maintain."

With reference to the alleged conflict between circuits, the effect of quotation from *Wm. Filene's Sons Co.* v. *Fashion Originators' Guild*, 90 F. (2nd) 556, is dissipated by the later case involving the Guild decided by this Court. In *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U. S. 457, 466, 61 S. Ct. 703, 707, this Court expressly disavowed the narrow catalog of offenses under the Sherman Act of the earlier case and came explicitly to a contrary conclusion on the merits.

In their citation of *Interborough News Company* v. *The Curtis Publishing Co.*, 225 F. (2d) 289, the petitioners deemphasize the fact that the quotation is made from the District Court's opinion not referred to by the Court of Appeals. The Court of Appeals 2nd (p. 293) view of the case was reflected as follows:

> "The nub of the matter is that the peculiar features of schemes for price fixing and *elimination of competition* which appear in such leading cases as *Interstate Circuit* v. *United States*, 1939, 306 U. S. 208, 59 S. Ct. 467, 83 L. Ed. 610, *United States* v. *Masonite Corp.*, 1942, 316 U. S. 265, 62 S. Ct. 1070, 86 L. Ed. 1461 and *United States* v. *United States Gypsum Co.*, 1948, 333 U. S. 364, 68 S. Ct. 525, 92 L. Ed. 746, are wholly absent here." (Emphasis supplied.)

Undoubtedly that Court would be surprised to have its decision cited as contrary to the holding here where elimination of competition is the "nub of the matter."

The opinions of the Courts of Appeals in *Hunt* v. *Crumboch*, 43 F. (2nd) 902, and *Leader* v. *Apex Hosiery*, 108 F. 2d 71, even if given the effect contended for by petitioners

are limited by this Court's opinions in these same cases which have been hereinbefore cited. This Court, in each instance, was careful to point out that there was not involved a conspiracy of competitors to eliminate another competitor.

Schwing Motor Company v. *Hudson Sales Corp.*, 239 F. (2nd) 176; *Miller Motors, Inc.* v. *Ford Motor Company*, 252 F. (2nd) 441; *Klon's Inc.* v. *Broadway-Hale Stores*, 255 F. (2nd) 214; *Shotkin* v. *General Electric Co.*, 171 F. (2nd) 236; *Feddersen Motors, Inc.* v. *Ward*, 180 F. (2nd) 519; and *Hudson Sales Corp.* v. *Waldrip*, 211 F. (2nd) 268, cited by defendants, also do not involve a conspiracy by competitors to eliminate a competitor. The issue in every case was whether or not refusals to do business with particular dealers were violative of the antitrust laws. There can be no doubt that if, in terms of the *Schwing* case, the circumstances revealed a plot by competitors such as General Motors and Ford to eliminate the sale of Hudson automobiles in the area involved, it would have been illegal and violative of the antitrust laws.

Two other Court of Appeals' opinions, *Riggall* v. *Washington County Medical Society*, 249 F. (2nd) 266, and *Kinnear-Weed Corp.* v. *Humble Oil and Refining Co.*, 214 F. (2nd) 891, cited by defendants do not establish the claimed conflict. In the first case, the Court pointed out that the plaintiff in the practice of his profession was not engaged in trade or commerce within Section 1 of the Sherman Act and had not been prevented from practicing that profession. These observations immediately preceded its observations relative to the "injury to the general public economically." 249 F. (2nd) 266, 268. In the second case, the Court was dealing with a general allegation of injury to the public by a violation of the patent laws. Clearly, the Court was correct in holding that that was not the type of public purpose protected by the antitrust laws.

The Padovich Case.

The petitioners feel that the Court of Appeals was "unduly influenced" by the opinion of this Court in *Radovich* v. *National Football League*, 352 U. S. 445. Petitioners further attribute to respondent the argument that after *Radovich* a single competitor in a competitive field could recover for injury, even if the public is not injured.

It is to be expected that the Court would be influenced by the *Radovich* case and would follow its principles. As for the paraphrase of respondent's argument, petitioners miss the point. Elimination of a competitor, through a conspiracy to restrain trade in interstate commerce injures the buying public and is an actionable violation of the antitrust laws which were designed to prohibit such activities.

It is believed that this is and was the law prior to *Radovich* and that *Radovich* is important because of the negation of the "public injury" implicitly contained in its reversal of the Court of Appeals.

The Court of Appeals in *Radovich* had in part rested its decision on the lack of public prejudice. 231 F. 2d 620, 623. The United States appeared as *amicus curiae* in the Supreme Court expressly and explicitly with reference to the "public injury" question.

There thus can be no doubt that it was in response to the Court of Appeals opinion and to the interpretation argued for by *amicus* that the Court said at pages 453, 454:

> "Petitioner's claim need only be 'tested under the Sherman Act's general prohibition on unreasonable restraints of trade,' *Times-Picayune Publishing Co.* v. *United States*, 1953, 345 U. S. 594, 614, 73 S. Ct. 872, 883, 97 L. Ed. 1277, and meet the requirement that petitioner has thereby suffered injury. Congress

has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. These laws protect the victims of the forbidden practices as well as the public. *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 1948, 334 U. S. 219, 236, 68 S. Ct. 996, 1006, 92 L. Ed. 1328. Furthermore, Congress itself has placed the private antitrust litigant in a most favorable position through the enactment of §5 of the Clayton Act. *Emich Motors Corp.* v. *General Motors Corp.*, 1951, 340 U. S. 558, 71 S. Ct. 408, 95 L. Ed. 534. In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws."

Petioners attempt to limit the scope of the *Radovich* opinion by insistence on its application only in a case where the conduct is, *per se*, a violation of the Sherman Act. The flaw in this argument is that the restraint in the *Radovich* case was to be "tested under the Sherman Act's general prohibition of *unreasonable restraints* of trade." (Emphasis supplied.)

Even assuming the *Radovich* case involved a *per se* violation of the Sherman Act, Petitioners' position is not improved. It may be confidently and categorically stated that a conspiracy of competitors to eliminate another competitor is in itself an unreasonable restraint of competition. When, as here, the conspiracy results in the elimination of a competitor engaged in interstate commerce, to its damage, the right of action is complete.

The Propriety of Summary Judgment.

The sole basis for summary judgment now insisted upon relies on the "public injury" argument treated in the foregoing. Since petitioners' arguments have, in the words of the Court of Appeals, "completely misconceived and misapplied the principle they invoke" the premise on which they rely in this regard has no validity. It should be noted however, that, with reference to the "public injury" argument, the Court of Appeals found both allegations and proof tending to establish the truth of the allegations in support of public and private injury.

This finding is not objected to, but instead petitioners attempt to palm off on this Court the impression that respondent Bankers failed to make proof of its allegations in this aspect and that the Court reversed the summary judgment on the basis that it might better its case before trial. The opinion itself refutes petitioner.

CROSS-PETITIONER'S CLAIMS.

The Cross Petition filed herein by Respondent-Cross-Petitioner, Hartford Accident and Indemnity Company, attempts to create an "either, or" situation resulting in its conclusion that the Court of Appeals should have, as to it, affirmed the Summary Judgment.

Its argument is, that the actions complained of were either under the immunity afforded by the official status of its principal, Cravey, or were private acts for which the surety is not liable. A vague intimation is also made that, since Cravey is no longer a party to the suit, there is no longer any right of action against it as surety.

This argument, for rather obvious reasons, fails to point out to this Court the Georgia Statutes governing

Cross-Petitioner's obligations. Section 89-418 of the Georgia Statutes Annotated, follows:

> "Conditions of Liability.—Every official bond executed under this Code is obligatory on the principal and surety thereon. * * *
>
> 4. For the use and benefit of every person who is injured, either by any wrongful act committed under color of his office, or by his failure to perform, or by the improper or neglectful performance of those duties imposed by law."

Thus, Georgia law expressly permits an action by anyone injured by a wrongful act or the improper performance of an act by the public officers of Georgia, (See Chapter 89-4 of the Code of Georgia generally). Further, Georgia is probably unique in that a direct action against the surety is permitted without a joinder of the principal, or without first obtaining a judgment against the principal. *Zachry* v. *City Council of Augusta*, 78 Ga. App. Reports, 746, 749.

Astonishingly enough, cross-petitioner cites *Culpepper* v. *U. S. Fidelity & Guaranty Co.*, 199 Ga. 56, 33 S. E. 2d 168, and quotes the holding of the Court that a cause of action will lie against a surety *only* when the harmful acts are done by virtue of or under color of office. This holding is in square opposition to cross-petitioner's theory of official immunity.

The McCarran Act.

Cross-petitioner also states that the McCarran Act (Title 15, Sections 1011-1015) requires reversal of the Court of Appeals. Nothing in the Act itself is pointed out as requiring this reversal. Indeed, Cross-Petitioner admits (P. 3, Cross-Petition):

> "The provision of the McCarran Act which reserves jurisdiction under the Sherman and Clayton Acts in

cases of conspiracy applies to conspiracies which affect the public interests, the subject which was before the Court in the *Southeastern Underwriters* case".

This statement qualifies as an admission against Cross-petitioner's interest, an admission that the proviso of Sec. 1012 of the Act is applicable.

The Georgia Insurance Commissioner.

In view of the description of the activities of Cravey, the assertion by Cross-Petitioner that the extensive powers of the Insurance Commissioner somehow authorize or immunize these activities must create some wonderment as to the Georgia law. As the Court of Appeals noted:

> * * * "There is no authority, statutory or otherwise, authorizing the Insurance Commissioner of Georgia or Florida to conspire with persons to restrain commerce or exempting them from such if they do so * * *"

If so authorized, the supremacy of Federal law would require that the authority of any such State law must yield. *Solo Electric Co.* v. *Jefferson Electric*, 117 U. S. 173, 186.

CONCLUSION.

Neither Petitioners nor Cross-Petitioner have undermined the legal propriety of the decision of the Court of Appeals. Since no conflict exists and since the Court of Appeals opinion is in full harmony with views expressed on many occasions by this Court, the Petition and the Cross-Petition should be denied.

All of which is respectfully submitted.

CHARLES F. SHORT, JR.,
MILLER WALTON,
Attorneys for Respondent,
Bankers Life & Casualty Company.

FILE COPY

Office Supreme Court, U.S.
FILED
SEP 18 1958
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

HARTFORD ACCIDENT AND INDEMNITY COMPANY,
Petitioner,
v.
RESERVE LIFE INSURANCE COMPANY, GEORGE WASHINGTON LIFE INSURANCE COMPANY, PROFESSIONAL INSURANCE CORPORATION, BANKERS LIFE AND CASUALTY COMPANY, and J. EDWIN LARSON,
Respondents.

No. 377

CROSS PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals,
Fifth Circuit.

M. F. GOLDSTEIN,
B. D. MURPHY,
ROBERT E. COLL,
Attorneys for Petitioner Hartford Accident and Indemnity Company.

1130 Citizens and Southern National Bank Building,
Atlanta 3, Georgia.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

INDEX

	Page
The questions presented for review	2
Statement of the case	2
The question of public interest	4
Argument	5
Prayer	9
Certificate of service	9

Cases Cited.

Banker's Life & Casualty Co. v. Holland, 346 U. S. 379	5
Culpepper v. U. S. Fidelity & Guaranty Co., 199 Ga. 56, 33 S. E. 2d 168	8
DeBusk v. Harbin, 212 F. 2d 143	6
Federal Trade Commission v. American Hospital and Life Insurance Company, 350 U. S. 560	3
Laughlin v. Rosenman, 163 F. 2d 843	8
Malone v. Howell, 192 Sou. 224	8
Phelps v. Dawson, 97 F. 2d 389 (8th Ct.)	7
Southeastern Underwriters case, 322 U. S. 533	3
Spalding v. Vilas, 161 U. S. 483, 40 L. ed. 780	6

Statutes Cited.

Ga. Code, § § 40-502, 40-1402	5
15 U. S. C. A., § 15b, Act of July 7, 1955, 69 Stat. 283	5
28 U. S. C., § 1254 (1)	2

IN THE

SUPREME COURT OF THE UNITED STATES.

HARTFORD ACCIDENT AND INDEMNITY COMPANY,

Petitioner.

v.

RESERVE LIFE INSURANCE COMPANY, GEORGE WASHINGTON LIFE INSURANCE COMPANY, PROFESSIONAL INSURANCE CORPORATION, BANKERS LIFE AND CASUALTY COMPANY, and J. EDWIN LARSON,

Respondents.

No. .....

CROSS PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals, Fifth Circuit.

Hartford Accident and Indemnity Company hereby petitions this Court for a cross-writ of certiorari to the United States Court of Appeals for the Fifth Circuit, and makes respondents thereto Bankers Life and Casualty Company, J. Edwin Larson, Reserve Life Insurance Company, George Washington Life Insurance Company, and Professional Insurance Corporation.

Your petitioner shows:

(a) This petitioner is one of the parties named in the petition for a writ of certiorari filed by Reserve Life Insurance Company et al., which has been docketed in this Court as No. 272 of the October Term, 1958. The petitioner is one of the defendants in the original case above referred to.

(b) The opinion of the Court of Appeals for the Fifth Circuit rendered June 30, 1958, appears as Appendix A to

the original petition for certiorari in this case, filed by Reserve Life Insurance Company et al. in Case No. 272.

(c) The matters on which petitioner relies appear entirely in the pleadings and record filed by petitioners in Case No. 272 and no additional record is necessary.

(d) The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by certiorari and to pass on the additional questions made by this cross-petition is 28 U. S. C., § 1254 (1).

The Questions Presented for Review:

(1) May the surety on the bond of a public state official payable to the Governor of the State and conditioned only for the faithful performance of duty by the public official be sued in a Federal District Court in another State in an action for treble damages for an alleged conspiracy in restraint of trade of the business of life, accident, health and hospitalization insurance, where the public official is not a party defendant, and no suit is pending against him as principal on the bond, and where the alleged wrongful acts which constitute the basis for the action were done outside the duties and jurisdiction of the public official?

(2) Does a public officer's immunity from suit for matters done in discharge of his duties or under color of his office inure to the benefit of the surety?

Statement of the Case:

For the purpose of this petition, the statement of the case made by the Court of Appeals in its decision below is sufficient. The opinion appears in the record and as Appendix A to the brief of the petitioners in Case No. 272.

In the District Court there was a summary judgment in favor of the defendants, after motion made by this defendant, now petitioner, to dismiss the case against it

upon the pleadings, and after motions by the other defendants based upon depositions and affidavits, as well as the pleadings. The Court of Appeals reversed, holding that the case was not one for summary judgment.

The defenses of this petitioner, which are summarized by the Court of Appeals as a footnote to its opinion and appear on page 7 of Appendix A of the brief of the petitioner in Case No. 272, were neither considered nor passed upon.

The following legal principles are believed to be controlling and require a reversal of the judgment of the Court of Appeals and an affirmance of the decision of the District Court:

1. The McCarran Act, passed by Congress following the decision of this Court in the **Southeastern Underwriters** case (322 U. S. 533), removed the business of insurance from the scope of the Sherman and Clayton Acts to the extent that such business was regulated by State law.

This statute, insofar as it applies to advertisements by insurance companies, was recently construed by this Court in **Federal Trade Commission v. American Hospital and Life Insurance Company**, 350 U. S. 560, in which the judgment of the Fifth Circuit was affirmed.

The provision of the McCarran Act which reserves jurisdiction under the Sherman and Clayton Acts in cases of conspiracy applies to conspiracies which affect the public interest, the subject which was before the Court in the **Southeastern Underwriters** case.

2. The acts of the Insurance Commissioner of Georgia are partly administrative and partly judicial. His actions are not subject to review by the Court.

3. This petitioner is not liable if the principal on the bond, Zack Cravey, the Insurance Commissioner, is not liable.

4. Construing the pleadings as they were construed by the Court of Appeals in its holding that the aforesaid defenses were not available to the Insurance Commissioner because the alleged wrongful acts were personal acts done as a part of the conspiracy against the plaintiff, it follows that there is no liability on the part of this petitioner since its bond does not cover personal wrongs done by the principal, but only wrongs done by the Insurance Commissioner in the discharge of the duties of his office or under color of his office.

The Question of Public Interest:

The decision below gives rise to two questions of public interest:

(a) The effect of the decision of the Fifth Circuit in this case is to reverse the rulings of this Court in other cases dealing with all of the questions presented; and it is in direct conflict with previous decisions of the Fifth Circuit.

(b) It raises a question of particular importance, not only to the surety company that is petitioner herein, but to all sureties on bonds of public officials.

The penalty of this bond is $20,000 and it must be assumed that under ordinary circumstances the surety's liability would be asserted in the State where the bond was executed and by the public official who is the obligee; in this case the Governor of Georgia. But, if the principle announced by the Fifth Circuit is allowed to stand, a surety company may be sued on such a bond in any District Court in the United States. It may be made a party, as it was here, in an action claiming damage to the amount of $30,000,000. It is important that public officials and their sureties know the extent of the liability incurred by them when they file bonds complying with local statutes.

ARGUMENT.

Petitioner was named as a defendant in this case as the surety on the official bond of a public state official, Zack D. Cravey, as Comptroller General of the State of Georgia, and was sued solely in its capacity as such surety.

The Comptroller General of Georgia is a constitutional officer elected by the people. By virtue of his office, he is Insurance Commissioner. His duties as Insurance Commissioner are statutory.

Zack D. Cravey, who then held and now holds office as Comptroller General and Insurance Commissioner, was named as a defendant—not in his official capacity, but in his personal capacity. This petitioner, as surety on his bond, was joined.[1]

The bond of the Comptroller General is "conditioned for the faithful performance of all of the duties of his said office and all such duties as shall be required of him by the General Assembly or the laws of this State, and for a faithful account of all the public moneys and effects that may come into his hands during his continuance in office." Ga. Code, §§ 40-502, 40-1402.

Courts uniformly deny recovery of damages from public officials on account of acts done under color of office.

The powers conferred upon the Comptroller General of Georgia in his capacity of Insurance Commissioner are very

---

[1] As to Cravey, but not as to his surety, the action was transfered to the Northern District of Georgia. See **Bankers Life & Casualty Co. v. Holland**, 346 U. S. 379. Cravey ceased to be a party to the Florida case. As to Cravey, the case was dismissed by the plaintiff after the transfer, and before answer.

Plaintiffs' right of action against Cravey is now barred. 15 U. S. C. A., § 15b, Act of July 7, 1955, 69 Stat. 283.

broad and general as indeed they must be to enable him to perform the duties of his office and protect the public in relation to the activities and operations of insurance companies.

Throughout the complaint it is clear that the principal on the bond executed by petitioner is charged with misconduct in connection with the performance of the duties of his office. It is alleged that the Insurance Commissioner of Georgia and the Insurance Commissioner of Florida conspired together to use the powers of their respective public offices to suppress, eliminate and destroy the business of the plaintiff. The complaint proceeding only against his surety alleges in great detail acts charged to the Insurance Commissioner of Georgia, either separately or in conspiracy with other Insurance Commissioners. Thus the petition must seek to recover against the petitioner on account of acts done by Cravey in his official capacity. Otherwise, as will be seen, no case is stated at all against petitioner.

Public officials discharging their public duties, even though acting maliciously, are not liable in damages on account of such official action. The rule is based upon considerations of public policy. The underlying reason is that pointed out by the Supreme Court of the United States in **Spalding v. Vilas**, 161 U. S. 483, 40 L. ed. 780:

> "In exercising the functions of his office, the head of an executive department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may at any time be the subject of inquiry in a civil suit for damages."

The Court of Appeals for the Fifth Circuit, in **DeBusk v. Harbin**, 212 F. 2d 143, affirmed the dismissal of an action for damages for alleged malicious treatment received

from federal officials, which resulted in the plaintiff losing his job, and said:

> "Stripped of its immaterial and superfluous allegations, the petition merely alleges, in effect, that appellant's discharge caused him to suffer actionable damage because it was improperly motivated. However, as the trial court notes (footnote 1, supra) the legal sufficiency of the claim for damages does not properly hinge upon any subjective inquiry into appellee's intent in causing appellant's dismissal, but is based upon objective considerations of a public policy designed to protect public officials from undue harassment by civil litigation for acts committed by law to their control or supervision, and within the scope of their duties and authority. See Gregoire v. Biddle, supra, 177 F. 2d at page 581; Waterman v. Nelson, supra; Cooper v. O'Connor, 69 App. D. C. 100, 99 F. 2d 135, 140, 1942, 118 A. L. R. 1440."

There can be no liability on the part of a surety company unless there is liability on the part of the principal on the bond.

> "The rule of law which governs the liability of sureties upon bonds generally is that the surety is not liable unless the principal is, and, therefore, may plead any defense available to the principal."
>
> Phelps v. Dawson, 97 F. 2d 389 (8th Ct.).

If there can be no recovery against the Comptroller General of Georgia, who is not a party to this case, and as has been seen, there can be no such recovery, there can, of course, be no recovery as against the surety on his official bond.

However, if it is contended that there could be a recovery against the Comptroller General of Georgia because his acts were **not** committed under color of his office, with the

result that he does not possess the immunity from suit which the courts have uniformly said exists to protect a public officer, then it necessarily follows that the conduct complained of was **not** done under color of his office, with the result that there is no liability against the surety on his bond.

In **Culpepper v. U. S. Fidelity & Guaranty Co.**, 199 Ga. 56, 33 S. E. 2d 168, the Supreme Court of Georgia held:

> "A cause of action against a deputy sheriff when sued on his official bond, together with his surety thereon, is shown only if the harmful act was done by virtue of or under color of office. No liability thereon attaches for personal malfeasance of the officer, although done when en route to serve a jury summons."

Malone v. Howell, 192 Sou. 224, is a decision of the Supreme Court of Florida to the same effect.

The Supreme Court of Georgia in the Georgia case cited, and the Supreme Court of Florida in the Florida case cited, cite many other cases to the same effect.

The application of the rule of immunity of public officials is not avoided by allegations that the defendants are sued in their personal capacity.

Laughlin v. Rosenman, 163 F. 2d 843.

It is thus seen that if the Comptroller General of Georgia was acting in his official capacity, he is protected by the immunity rule, and the surety on his bond is not liable. If he was not acting in his official capacity, but was acting outside of the scope of his duties, then his surety is not liable or responsible for his acts. In either event there is no right here to recover against the petitioner.

The judgment of the District Court sustaining petitioner's motion for summary judgment was correct.

PRAYER.

It is respectfully prayed that a writ of certiorari issue from this Court to the Court of Appeals for the Fifth Circuit and that the decision of that Court be reversed and the judgment of the District Court be reinstated.

Respectfully submitted,

.....

M. F. GOLDSTEIN,

.....

B. D. MURPHY,

.....

ROBERT E. COLL,

Attorneys for Petitioner
Hartford Accident and Indemnity
Company.

1130 Citizens and Southern
National Bank Building,
Atlanta 3, Georgia.

FILE COPY

Office Supreme Court, U.S.
FILED
OCT 13 1958
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 377.

HARTFORD ACCIDENT AND INDEMNITY COMPANY,
Petitioner,

v.

RESERVE LIFE INSURANCE COMPANY, GEORGE WASHINGTON LIFE INSURANCE COMPANY, PROFESSIONAL INSURANCE CORPORATION, BANKERS LIFE AND CASUALTY COMPANY, and J. EDWIN LARSON,
Respondents.

AMICUS CURIAE

BRIEF

Of Eugene Cook, Attorney General, in Behalf of the State of Georgia and in Support of Cross Petition for Certiorari Filed in the Above Captioned Case.

EUGENE COOK,
Attorney General of Georgia,
State Judicial Building,
Atlanta, Georgia.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

INDEX.

	Page
The question of public interest	2
I. The bond does not authorize suit by third persons	3
II. The plaintiff as a third person must rely on a statute	4
III. The petition sets forth no claim for the recovery of damages arising out of a breach of the conditions of the bond	5
Argument	6

Cases Cited.

Bankers Life and Casualty Company v. Cravey, 90 Ga. App. 113, 83 S. E. 2d 150	2
Bankers Life and Casualty Company v. Cravey, 208 Ga. 682, 69 S. E. 2d 87	2
Cravey v. Bankers, 209 Ga. 274, 71 S. E. 2d 659	2
DeBusk v. Harvin, 212 F. 2d 143 (Fifth C. C. A.)	6
Ford Motor Company v. Treasury Dept., 323 U. S. 459, 89 L. Ed. 389	5
Fidelity and Deposit Co. v. Smith, 37 Ga. App. 744, 141 S. E. 672	6
Kennecott Copper Co. v. State Tax Commissioner, 327 U. S. 573-580, 66 S. Ct. 745, 90 L. Ed. 862	5
Middletown N. Bank v. Toledo A. A. & N. M. RR Co., 197 U. S. 394	4
Northern Life Ins. Co. v. Read, 322 U. S. 47, 64 S. Ct. 873, 88 L. Ed. 1121	5
Parker v. Brown, 317 U. S. 341 at 351	2

Shriver v. Woodbine Savings Bank, 285 U. S. 467 at 478 5

U. S. v. Employing Plasterers Assn., 347 U. S. 186, at 189 6

Statutes Cited.

Ga. Code, § 20-1403 4
Ga. Code, § 89-420 4
Ga. Code, § 89-422 5

Textbook Cited.

C. J. S., § 5, Actions 4

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 377.

HARTFORD ACCIDENT AND INDEMNITY COMPANY,
Petitioner,

v.

RESERVE LIFE INSURANCE COMPANY, GEORGE WASHINGTON LIFE INSURANCE COMPANY, PROFESSIONAL INSURANCE CORPORATION, BANKERS LIFE AND CASUALTY COMPANY, and J. EDWIN LARSON,
Respondents.

BRIEF

Of Eugene Cook, Attorney General, in Behalf of the State of Georgia and in Support of Cross Petition for Certiorari Filed in the Above Captioned Case.

This brief is filed under the provisions of Rule 27-D of this Court in support of the cross petition of Hartford Accident and Indemnity Company, which for brevity will hereafter be referred to as "Hartford." Application for certiorari in the main case is now pending in this Court, No. 272. Reference to the statements of fact in the petition and cross petition for certiorari is respectfully made.

THE QUESTION OF PUBLIC INTEREST:

In addition to the grounds set forth in the cross petition, the Attorney General respectfully represents to the Court that the decision of the Court of Appeals reversing the dismissal of the Hartford as a party defendant in the case results in the extension of the jurisdiction of the District Court in Florida over the Insurance Commissioner of Georgia who had been dismissed as a party to the case.

This controversy is between insurance companies engaged competitively in the same line of business and the Insurance Commissioners of Georgia and Florida who are charged with partiality in their rulings. There has been much controversy and litigation between the plaintiff and Insurance Commissioner Cravey. These include two cases decided by the Supreme Court of Georgia. **Bankers Life and Casualty Company v. Cravey**, 208 Ga. 682, 69 S. E. 2d 87, and **Cravey v. Bankers**, 209 Ga. 274, 71 S. E. 2d 659. Also, **Bankers Life and Casualty Company v. Cravey**, 90 Ga. App. 113, 83 S. E. 2d ...., in which the effort of the insurance company to obtain a license without qualifying in accordance with the state regulations was denied by the Court of Appeals of Georgia.

Whether the Insurance Commissioner may be joined in an anti-trust suit which involves his rulings is extremely doubtful. This court in **Parker v. Brown**, 317 U. S. 341 at 351, said, "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a State or its officers or agents from activities directed by its Legislature."

But the ruling in the case at bar goes much further. It confers jurisdiction in an anti-trust case where the only service is on a surety company in a distant state, whose only connection with the case is its suretyship on the official bond. Such an extension of jurisdiction should not be made by default, and an examination of the decision

of the Court of Appeals indicates that the defenses of the surety company though noted, were neither discussed nor ruled on, the reversal being based entirely on matters dealing with the other defendants. 257 F. 2d 377.[1]

I. THE BOND DOES NOT AUTHORIZE SUIT BY THIRD PERSONS.

The bond executed by Hartford is payable to the Governor of Georgia.[2]

---

[1] The Court held that the evidence presented a genuine issue as to a material fact and the case could not properly be dismissed on summary judgment. (Determination of the issues raised by the cross petition does not involve an examination of the facts.) The Court discussed the contention of the Florida Commissioner that he was immune from accountability in this suit because of his official position, and held that such immunity would not exempt the Commissioners of Georgia and Florida from liability for a conspiracy to restrain commerce. So far as the Georgia Commissioner is concerned, this was pure dicta since he was not a party to the case. The points raised in this cross petition may be decided without reference to the voluminous record filed in the main case, No. 272.

[2] "Exhibit A."

Hartford Accident and Indemnity Company,
Hartford, Connecticut.

State of Georgia Bond No. 2305662

Bond of Comptroller General.

Know All Men By These Presents, That we, Zack D. Cravey, 1689 Johnson Road, N. E., Atlanta, Georgia, as Principal, and Hartford Accident and Indemnity Company, of Hartford, Connecticut, as Surety, are held and firmly bound unto the Governor of the State of Georgia, Honorable Herman Eugene Talmadge, and/or his successor, or successors, in office, in the just and full sum of Twenty Thousand and No/100 ($20,000.00) Dollars, to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally firmly by these presents.

Sealed With Our Seals And Dated this 6th day of December, 1950.

The Condition Of The Above Obligation Is Such, That, Whereas, the above bound Zack D. Cravey was, on the 7th day of November, 1950, duly and legally elected Comptroller General of the State of Georgia for the term of four (4) years beginning January 14, 1951.

Now, Therefore, should the said Zack D. Cravey faithfully discharge the duties of the office of Comptroller General of the State

II. THE PLAINTIFF AS A THIRD PERSON MUST RELY ON A STATUTE.[3]

A statutory remedy to enforce a right created by the same statute is exclusive, unless the statute clearly shows a contrary intention, C. J. S., § 5, Actions. Middletown N. Bank v. Toledo A. A. & N. M. RR Co., 197 U. S. 394.

The remedy is by suit in a court in Georgia and a suit on the bond in Florida will not lie. "The remedy must be pursued in the courts of that state." Middletown N. Bank case, supra, p. 406.

---

of Georgia, during the time he continues therein, or discharges any of the duties thereof, then the above bond to be void; otherwise to be in full force and effect.

By /s/ Zack D. Cravey,
Principal.

Witnesses:
/s/ Frances L. Williams,
/s/ Helen L. Bryans,
As to Principal.

.....
.....
As to Surety.

Hartford Accident & Indemnity Co.,
By /s/ Agnes Chandler,
Attorney-in-Fact (Agnes Chandler).

Approved as to Form:
/s/ Eugene Cook,
Attorney General.

Attested and Approved by Me This 17 day of Jan., 1951.
/s/ Herman E. Talmadge,
Governor of the State of Georgia.

[3] Ga. Code, § 80-420. Actions on bonds; persons who may bring; jurisdiction.—Suits on bonds taken from public officers may be brought by any person aggrieved by the official misconduct of the officer, in his own name, in any court having jurisdiction thereof, without an order for that purpose. (Acts 1853-4, p. 57.)

Ga. Code, § 20-1403. Penalties.—Penalties in bonds are not liquidated damages; and even if called such, yet, if it appears unreasonable and not so actually intended by the parties, the law will give only the actual damages, and in all cases where the damage is capable of computation, and is not uncertain in its character, such stipulations will be declared to be penalties.

The Georgia statute provides that suit may be instituted in any court having jurisdiction thereof, but clearly this means any Court in Georgia. Third party rights arise only from official duties, and these duties are necessarily performed within the state. This court has held that other remedies are impliedly excluded. Compare **Shriver v. Woodbine Savings Bank**, 285 U. S. 467 at 478.[4] **"The statute increasing the beneficiaries under the bond to third persons provides for suits on bonds."** (Emphasis ours.) By no stretch of the imagination can these complex proceedings be termed a suit on the bond.

III. THE PETITION SETS FORTH NO CLAIM FOR THE RECOVERY OF DAMAGES ARISING OUT OF A BREACH OF THE CONDITIONS OF THE BOND.

Plaintiff's only claim (par. 33, Complaint R.) is for the recovery of the penalty of the bond, "since Hartford is firmly bound to pay to this plaintiff up to that amount for any damages found to have been inflicted by said defendant, Zack D. Cravey, due to his illegal acts as aforesaid."

The statute does not provide for recovery of this class of damages, and no specific damages within the ambit of the statute are sued for.

The Court of Appeals has construed the petition as a suit for personal dereliction beyond the duties of the office, 257 F. 2d 377. For such actions, the surety on the bond is not liable. "His conduct was a mere usurpation where he

---

[4] This Court on three occasions has considered statutes authorizing suits "in any court of competent jurisdiction" and held that where the fiscal position of the state is involved, this phrase will be limited to courts of the state, excluding suit in the Federal court. *Northern Life Ins. Co. v. Reed*, 322 U. S. 47, 64 S. Ct. 873, 88 L. Ed. 1121; *Ford Motor Company v. Treasury Dept.*, 323 U. S. 459, 89 L. Ed. 389; *Kennecott Copper Co. v. State Tax Commissioner*, 327 U. S. 573-580, 66 S. Ct. 745, 90 L. Ed. 862. A recovery by a third person necessarily diminishes the security of the state, its law provides, § 89-422. "Official bonds of public officers should not be discharged by single recovery but proceedings may be had from time to time until the whole penalty is exhausted against the officer and his sureties or either."

had no authority to act at all in the matter. Where an officer commits a wrong under circumstances in which the law imposes no duty upon him to act at all, the wrong is personal and not a breach of the official bond." **Fidelity and Deposit Co. v. Smith**, 37 Ga. App. 744, 141 S. E. 672.

ARGUMENT.

For nearly 100 years the courts, State and Federal, have enforced "a public policy designed to protect the public officials from undue harassment by civil litigation for acts committed by law to their control or supervision, and within the scope of their duties and authority." **DeBusk v. Harvin**, 212 F. 2d 143 (Fifth C. C. A.). The same court in the ruling complained of here abandons this long standing rule and subjects a public official to a lengthy trial with other defendants, burdening him with absences from his official duties and liability for great expense, and it does so in his absence and by virtue of service on a surety company whose bond does not cover the principal issues in the case.

The judgment dismissing Hartford was reversed because a summary judgment was not deemed applicable. But this Court has suggested the desirability of summary judgment proceedings on complex and involved anti-trust cases to avoid an expensive full dress trial. **U. S. v. Employing Plasterers Assn.**, 347, U. S. 186, at 189.

For none of the reasons stated in the decision of the Court of Appeals was the summary judgment in favor of the Hartford erroneous. This Court should grant the cross petition for certiorari, reverse the judgment of the Court of Appeals and restore the judgment of the District Court dismissing the Hartford from the case.

Respectfully submitted,

EUGENE COOK,
Attorney General of Georgia,
State Judicial Building,
Atlanta, Georgia.

FILE COPY

Office Supreme Court,
FILED
OCT 24 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 377

HARTFORD ACCIDENT AND INDEMNITY COMPANY,

Petitioner,

vs.

RESERVE LIFE INSURANCE COMPANY, GEORGE WASHINGTON LIFE INSURANCE COMPANY, PROFESSIONAL INSURANCE CORPORATION, BANKERS LIFE AND CASUALTY COMPANY, AND J. EDWIN LARSON,

Respondents.

BRIEF ON BEHALF OF RESPONDENT BANKERS LIFE AND CASUALTY COMPANY IN OPPOSITION TO BRIEF OF EUGENE COOK, ATTORNEY GENERAL, ON BEHALF OF THE STATE OF GEORGIA.

CHARLES F. SHORT, JR.,
111 W. Washington Street,
Chicago 2, Illinois,

MILLER WALTON,
916 Alfred I. duPont Building,
Miami 32, Florida,

Attorneys for Respondent, Bankers Life and Casualty Company.

THE DUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

Cases Cited.

	PAGE
Ford Motor Company v. Treasury Dept., 323 U. S. 459	3
Kennecott Copper Co. v. State Tax Commission, 327 U. S. 573	3
Middletown N. Bank v. Toledo A. A. & N. M. R. R. Co., 197 U. S. 394	2, 3
Northern Life Ins. Co. v. Read, 322 U. S. 47	3
Shriver v. Woodbine Savings Bank, 285 U. S. 467	2

Statutes Cited.

Ga. Code, § 89-420	2

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1958.

No. 377.

HARTFORD ACCIDENT AND INDEMNITY COMPANY,

Petitioner,

vs.

RESERVE LIFE INSURANCE COMPANY, GEORGE WASHINGTON LIFE INSURANCE COMPANY, PROFESSIONAL INSURANCE CORPORATION, BANKERS LIFE AND CASUALTY COMPANY, AND J. EDWIN LARSON,

Respondents.

BRIEF ON BEHALF OF RESPONDENT BANKERS LIFE AND CASUALTY COMPANY IN OPPOSITION TO BRIEF OF EUGENE COOK, ATTORNEY GENERAL, ON BEHALF OF THE STATE OF GEORGIA.

The Brief of the Attorney General for the State of Georgia purports to be filed under Supreme Court Rule 27-D. No authority is found in that Rule for the Brief. Indeed even the Rule authorizing states to file "amicus" briefs, Rule 42, is not in point. The State of Georgia is not a party in interest, nor is its Insurance Commissioner. As the case now stands, and as is evident from the Attorney

General's Brief, the sole connection of this case with the State of Georgia is that the Hartford Accident and Indemnity Company is sued herein as the surety of a Georgia citizen, Zack D. Cravey. If Cravey was a party hereto, he would be individually liable. The Attorney General, in fact and in effect, is appearing as a sponsor of private interests, to-wit: Hartford Accident and Indemnity Company.

It is elementary law that an intervenor or amicus curiae takes a case as it exists at the time of intervention. It should be noted that if any "default" as charged by the Attorney General (Brief, page 2) has occurred in the presentation of a defense, this Court should not be requested to decide that which has not been preserved as a defense.

If the Attorney General's Brief is merely cumulative, then no reason for entertaining the arguments exists.

On the merits, the Attorney General has not sought to present an objective analysis of Georgia law. The claim is first advanced that the bond does not authorize suit by third persons. To establish this, the bond itself is set forth *in haec verba*. What the Attorney General does not disclose in this connection is that the applicable Georgia statutes do authorize suit directly against the surety on the type of bond herein involved. (Georgia Code, § 89-420, set forth, page 4, Attorney General's Brief.)

Squarely opposed to the inferences sought to be drawn in his first point, is the second point: that a statutory remedy is involved and that, somehow, Respondent Bankers Life & Casualty Company has not followed the statute. It should be made clear that this Respondent is not charged with failure to follow any statutory restrictions upon the exercise of its right to sue such as were involved in the case cited by the Attorney General, *Middletown N. Bank* v. *Toledo A. A. & N. M. RR. Co.*, 197 U. S. 394.

Instead, as it turns out, this Respondent is charged with selection of the wrong forum. This despite the concession that the Georgia statute provides that suit may be brought "in any court having jurisdiction." The Attorney General with absolutely no legal authority would have this Court interpolate "in any court in Georgia" in place of the embracive language of the statute. *Shriver v. Woodbine Savings Bank*, 285 U. S. 467, cited by the Attorney General is not an authority helpful to his argument. That case, in conformity with *Middletown Bank* v. *Railway Co.*, 197 U. S. 394, holds that where a statute creates a liability and "a remedy specially adapted to its enforcement other less appropriate common-law remedies are implicitly excluded." (p. 478.)

There is nothing in that case nor is there any Georgia case which limits the jurisdiction in the manner suggested by the Attorney General.

The footnote suggestion that the fiscal position of the State of Georgia is somehow here involved is devoid of merit. *Northern Life Ins. Co.* v. *Read*, 322 U. S. 47; *Ford Motor Company* v. *Treasury Dept.*, 323 U. S. 459; and *Kennecott Copper Co.* v. *State Tax Commissioner*, 327 U. S. 573, all turn on whether an individual or the State is the party in interest. In each case, the State was held to be the party in interest, not suable in Federal courts without a clear declaration of consent. The instant case does not involve the State as a party in interest.

The last bid of the Attorney General for this Court's interest is the claim that the bond and the statute authorizing recovery thereon do not provide for recovery in this suit under the construction of the Court of Appeals. The Court of Appeals said nothing with reference to this being a suit "for personal dereliction beyond the duties of the office." That a conspiracy is beyond the authority of the offices involved is, of course, true. That the activities in entering

into and pursuing the conspiracy were under color of office is also true. This is not a case where the actions complained of had nothing to do with official duties. Indeed the wrongs complained of were only possible because of the abuse of a public trust.

Georgia has seen fit to insure the public rectitude of its officials by permitting suit against them and their sureties by individuals injured by perversions of official duty. Whether this policy is or is not a wise policy may be open to question but it is certainly in square opposition to the claim that the Federal and State Courts will enforce an immunity from civil suit on behalf of state officials. To do so in this case would frustrate the supremacy of Federal law and would undermine the policy of Georgia as expressed by that division of its government charged with responsibility in the premises, the legislature of that State.

All of which is respectfully submitted,

CHARLES F. SHORT, JR.,
MILLER WALTON,
Attorneys for Respondent, Bankers Life and Casualty Company.